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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

We write to express our enthusiastic support for Ciara Cooney's application to serve as a law clerk in your chambers. Ciara's performance in the Constitutional Impact Litigation Practicum-Seminar that we co-taught in the fall of 2021 was consistently exceptional. Her clear and cogent writing style, professionalism, and ability to operate across a broad range of substantive legal areas would hold her in good stead in any judge's chambers.

The Practicum-Seminar is a 5-credit course that involves law students in the work of the Institute for Constitutional Advocacy and Protection (ICAP) at Georgetown Law. ICAP is a public interest law practice within the law school that pursues constitutional impact litigation in courts across the country. Ciara not only produced outstanding work in each case on which she worked, but she did so in a professional and efficient manner that will serve her well as a young lawyer. She earned an A in this rigorous course.

At ICAP, we try to give our best students, like Ciara, a broad range of work that allows them to develop their legal skills as they demonstrate their talents. Among other assignments, Ciara researched a circuit split involving the application of the relation-back rule of Fed. R. Civ. P. 15(c)(1)(C) where the identity of a defendant is unknown to the plaintiff at the time the complaint is filed. Because of her exceptional work on this research, we asked her to draft a portion of what later became a petition for certiorari in *Herrera v. Cleveland*. Ciara's research demonstrated her attention to detail and her analysis was clear, thorough and well written. Indeed, it led us to assign her the first draft of an amicus brief for filing in the Fifth Circuit in *Texas v. United States*, a case involving a challenge to the creation of the DACA program. The brief was on behalf of a bipartisan group of current and former prosecutors and, although Ciara was able to work from an earlier amicus brief that ICAP had filed in the Supreme Court in the challenge to the rescission of DACA, this new brief required substantial updating and an entirely new section of argument. Ciara's research was again extremely thorough and her writing exceptional. She also mastered the Fifth Circuit's rules so that our brief was in compliance.

Besides her work on *Herrera* and *Texas v. United States*, Ciara completed half of a 50-state survey of state commitment and release procedures following a not-guilty-by-reason-of-insanity (or equivalent) verdict. This detailed and substantial work product will help ICAP assess whether potential litigation in this area may be warranted.

Worth mentioning, as well, is the careful attention to detail that Ciara displayed in performing even mundane tasks like citechecking and proofreading ICAP briefs before filing. Ciara recognized the importance of scrupulous accuracy and adherence to bluebooking rules. We have no doubt that her skills across the board will make her a valuable asset in chambers.

Finally, in addition to Ciara's significant contributions to ICAP's work, Ciara was also a thoughtful contributor to our weekly seminar. The seminar covers topics such as threshold barriers to constitutional litigation (standing, abstention, etc.), legal theories under different constitutional provisions (due process, equal protection, First Amendment, etc.), and strategic considerations in impact litigation, among other things. Ciara was consistently well prepared and her contributions in these weekly discussions revealed her deep engagement with the material.

Together we have clerked at all three levels of the federal judiciary and, based on that experience, we believe that Ciara would be a welcome addition to any judge's chambers. She is mature, collegial, and thoughtful. Her legal writing is well organized and crisply articulated. And her flexibility across substantive legal areas is top-notch. We anticipate an impressive legal career ahead for Ciara.

We would be delighted to answer any further questions that you might have. Thank you for considering Ciara's application.

Respectfully submitted,

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WRITING SAMPLE

The attached writing sample is a final paper submitted for my seminar course, Federal Practice: Contemporary Issues. The paper discusses the development of the major questions doctrine and seeks to identify a judicially-administrable standard post-*West Virginia v. EPA*, 142 S. Ct. 2587 (2022). I am the sole author of this work and it has not been edited by anyone else.

WHAT MAKES A QUESTION MAJOR?—IDENTIFYING A JUDICIALLY ADMINISTRABLE MAJOR QUESTIONS STANDARD AFTER *WEST VIRGINIA V. EPA*

INTRODUCTION

The major questions doctrine, which has been looming in the wings of administrative law for several decades, took center stage in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). There, the Supreme Court determined that the Environmental Protection Agency (EPA) lacked authority under the Clean Air Act to establish a "best system of emission reduction" that would result in a "sector-wide shift in electricity production from coal to natural gas and renewable."[1] In doing so, the highly-anticipated decision confirmed the major questions doctrine is an independent canon of construction for courts reviewing administrative agency actions. While the decision justified the need for a major questions doctrine and detailed how a major questions analysis should proceed, it did not explain when a major questions analysis is necessary. Phrased differently, what makes a question major? This Paper seeks to provide a judicially-administrable analytical framework for identifying major questions. The Court's articulation of the major questions test in *West Virginia v. EPA* is the starting point and a close analysis of the major questions doctrine's foundations provides further clarification.[2]

Part I discusses the major questions doctrine's foundations and interrelated judicial review principles, specifically, the nondelegation doctrine and *Chevron* deference. Part II briefly summarizes *West Virginia v. EPA* and explains the nuances between the majority's major

[1] 597 U.S. ___, 142 S. Ct. 2587, 2603 (2022).

[2] As a threshold matter, this Paper accepts the existence of the major questions doctrine, as developed by the Supreme Court's jurisprudence and formally recognized in *West Virginia v. EPA*. This Paper does not address legitimate arguments that *West Virginia v. EPA*, and the major questions doctrine generally, is an erroneous departure from traditional statutory interpretation principles. Justice Kagan effectively made that argument in dissent and it has been further articulated by academics. *See West Virginia v. EPA*, 142 S. Ct. at 2633-34 (Kagan, J., dissenting); *see also, e.g.*, Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 263-64. Rather, this Paper accepts the validity of the major questions doctrine and seeks to derive a legitimate and administrable standard for identifying major questions cases.

questions standard and Justice Gorsuch's alternative approach, presented in concurrence. Part III first identifies several incorrect approaches to identifying major questions cases arising in the courts of appeals post-*West Virginia v. EPA*. These approaches conflict with the major questions doctrine or lack judicial administrability. Part IV then proposes the following judicially-administrable, element-based test to determine when a major questions analysis is needed. A major questions case requires two distinct elements: (1) a novel and extensive agency action based on the history and breadth of the agency's authority; *and* (2) the agency action implicates issues of great political and economic significance.[3] The factors considered in *West Virginia v. EPA* and their "common threads"[4] in prior cases reveal how the elements are satisfied. Requiring a sufficient showing of both elements ensures only "extraordinary cases" where "common sense" suggests Congress may not have delegated the authority at issue prompt a major questions analysis.[5] This approach, implicit in *West Virginia v. EPA*, has subsequently been endorsed by the U.S. Court of Appeals for the D.C. Circuit.[6]

I. THE FOUNDATIONS OF THE MAJOR QUESTIONS DOCTRINE

The major questions doctrine falls within the broader framework for judicial review of agency action. There are two foundational principles of judicial review critical to understanding the major questions doctrine: delegation of authority to administrative agencies and *Chevron* deference. This Part will (A) provide a brief synopsis of delegation principles and the relationship to judicial review; (B) explain the deferential standard of review established by *Chevron*; and (C) trace the subsequent development of the major questions doctrine.

[3] 142 S. Ct. at 2608.
[4] *Id.* at 2609.
[5] *Id.* at 2609 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[6] *See* Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359, 363–64 (D.C. Cir. 2022).

A. Congressional Delegation and Judicial Review of Agency Action

Separation of powers principles are derived from the vesting clauses of the U.S. Constitution, which assign all executive, legislative, and judicial powers to the corresponding branches.[7] The vesting of legislative power in Congress has been determined to include "a bar on its further delegation."[8] This prohibition on Congressional delegation of "powers which are strictly and exclusively legislative" is referred to as the nondelegation doctrine.[9]

To abide by the nondelegation doctrine, Congress must include an "intelligible principle" in the authorizing statute to guide the executive agency.[10] The intelligible principle standard is viewed broadly and Congressional delegations of authority to the executive branch have almost uniformly been upheld.[11] Congress has violated the nondelegation doctrine on only two occasions in 1935.[12] Since then, the Court has consistently upheld Congressional delegations of authority to executive agencies, prompting scholars to argue the nondelegation doctrine is a separation of powers red herring.[13] But some justices appear interested in reinvigorating the nondelegation doctrine. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), a plurality upheld Congress's delegation of authority to the Attorney General to determine how the Sex Offender Registration and Notification Act (SORNA) applied to sex offenders convicted prior to passage of SORNA.[14] Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, dissented and called for the

[7] Article I of the Constitution provides "[a]ll legislative Powers … shall be vested in a Congress of the United States." U.S. Const. art I, §1. Article II then vests the executive power in the President, U.S. Const. art II, §1, and Article III vests the judicial power in the Supreme Court, and inferior courts created by Congress, U.S. Const. art. III, §1. *See also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PENN. L. REV. 379, 389 (2017).
[8] *See* Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality).
[9] *See id.*; 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 11:13 (3d ed. 2022).
[10] *Gundy*, 139 S. Ct. at 2123 (quoting Mistretta v. United States, 488 U.S. 361, 372 (1989)).
[11] *See* Whittington & Juliano, *supra* note 7, at 392-406.
[12] *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[13] *See generally* Whittington & Juliano, *supra* note 7; Eric A. Posner & Adrian Vermuele, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).
[14] *Gundy*, 139 S. Ct. at 2121–24.

Court to "revisit" the nondelegation doctrine.[15] According to Justice Gorsuch, the Court has not been fulfilling its "obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities."[16] He proposed a more stringent standard for the "intelligible principle" test.[17] Concurring in the judgment in *Gundy*, Justice Alito also expressed his "support" for a reconsideration of the Court's approach, which has "uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards."[18]

Whether or not the Court bolsters the nondelegation doctrine, it frames the major questions doctrine because it defines the outer limits of authority that may be delegated to an agency. Congress cannot delegate "powers which are strictly and exclusively legislative,"[19] but Congress also "cannot do its job absent an ability to delegate power under broad general directives."[20] Within these hazy and indeterminate constraints, the Court has recognized an area of permissible delegation. As discussed further *infra*, the major questions doctrine is then a tool to determine whether Congress in fact delegated the authority asserted by the agency.

B. Chevron *Deference: Implicit Delegation*

Congress delegates powers to administrative agencies by authorizing the agency to administer statutes.[21] The agencies then "make all sorts of interpretive choices" about the statutes they administer.[22] Yet, it is emphatically the "province and duty" of the courts to determine "what the law is."[23] Therefore, prior to 1984, it was "universally assumed" that courts had the ultimate

[15] *Id.* at 2131 (Gorsuch, J., concurring).
[16] *Id.* at 2135.
[17] *Id.* at 2141.
[18] *Id.* at 2130–31 (Alito, J., concurring in the judgment).
[19] Wayman v. Southard, 23 U.S. 1, 42 (1825).
[20] Mistretta v. United States, 488 U.S. 361, 372 (1989).
[21] United States v. Mead Corp., 533 U.S. 218, 227 (2001).
[22] *Id.*
[23] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

"pronounc[ement] on the meaning of statutes."[24] Administrative agencies interpretations could receive some deference, but only to the extent they were persuasive.[25] Then, in an unsuspecting landmark case, the Court announced "a new approach to judicial review of agency interpretations of law."[26] *Chevron U.S.A. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984), held that courts must to defer to administrative agencies reasonable interpretations of ambiguous statutes that they administers.[27] Judicial deference was justified by an "implicit rather than explicit" delegation to of authority to the agency.[28] *Chevron* "vastly expanded the sphere of delegated agency lawmaking" by determining that Congress "impliedly delegated primary authority to [agencies] to interpret [ambiguous] statute[s]."[29]

The reaction to *Chevron* deference has been vehement and lasting.[30] Current critics argue it is an afront to the Constitution and undermines separation of powers. For instance, Justice Thomas views *Chevron* deference as in tension with Article III's vesting clause because it "wrests from Courts the ultimate interpretative authority to 'say what the law is,' and hands it over the to the Executive."[31] And Justice Kavanaugh, while serving on the D.C. Circuit, criticized *Chevron* deference as an "atextual intervention by courts" that "encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints."[32] While *Chevron* still remains good law, the

[24] *See* Thomas W. Merrill, *The Story of* Chevron, 66 Admin. L. Rev. 254, 257 (2016).
[25] *See* Skidmore v. Swift & Co., 323 US. 134 (1944).
[26] Cass R. Sunstein, Chevron *Step Zero*, 92 Va. L. Rev. 187, 189 (2006).
[27] 467 U.S. 837, 842 (1984).
[28] *Id.*
[29] Merrill, *supra* note 24, at 256.
[30] *See, e.g.*, Cass R. Sunstein, Chevron *as Law*, 107 GEO. L. J. 1613, 1615–20 (2019).
[31] Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).
[32] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2151 (2016).

Court has sought to significantly limit its scope.[33] The major questions doctrine arose as one of these limiting principles.[34]

C. The Development of a Major Questions Doctrine

In *West Virginia v. EPA*, the Court formally "announce[d] the arrival of the 'major questions doctrine.'"[35] But the roots of the major questions doctrine trace back almost three decades.[36] Although the "Court ha[d] never even used the term 'major questions doctrine'" before *West Virginia v. EPA*,[37] the "'label' … took hold because it refer[ed] to an identifiable body of law" with common threads recognized by scholars and jurists.[38] The major question doctrine seemingly sought to address (1) which institution should have comparative authority, the judiciary or the executive agency, to interpret the scope of statutory delegations, as governed by *Chevron* deference; and/or (2) the permissible scope of Congressional delegations to administrative agencies, as restrained by the nondelegation doctrine.

The major questions doctrine was initially presented as a *Chevron* deference limit. In *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), the Federal Communications Commission was not entitled to *Chevron* deference because the Commission's interpretation of the term "modify" in Section 203 of the Communications Act went "beyond the meaning that the statute [could] bear."[39] The Court then held that the FCC lacked authority under the Communications Act to adopt the proposed policy because it was "a fundamental revision of the

[33] *See, e.g.*, James Kunhardt & Anne Joseph O'Connell, *Judicial deference and the future of regulation*, BROOKINGS INST. (Aug. 18, 2022) https://www.brookings.edu/research/judicial-deference-and-the-future-of-regulation/ (identifying the major questions doctrine as a limit placed on *Chevron* deference).
[34] *See, e.g.*, Sunstein, *supra* note 30, at 1676–76 (explaining the major question doctrine can be understood as "a kind of 'carve out' from *Chevron* deference"); Kunhardt & O'Connell, *supra* note 33.
[35] 142 S. Ct. 2587, 2633–34 (2022) (Kagan, J., dissenting).
[36] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 229 (1994).
[37] *West Virginia v. EPA*, 142 S. Ct. at 2633–34 (Kagan, J., dissenting).
[38] *Id.* at 2609 (majority opinion).
[39] 512 U.S. 218, 229 (1994).

statute."[40] Six years later, in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court again withheld *Chevron* deference when the Food and Drug Administration (FDA) interpreted the Food, Drug and Cosmetic Act (FDCA) as authorizing FDA regulation of tobacco products.[41] Despite *Chevron*'s premise that "ambiguity constitutes an implicit delegation from Congress," the Court determined "[i]n extraordinary cases … there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[42] Because this constituted an extraordinary case, deference was not appropriate.[43] This strand of the major questions doctrine, reflected in a few other subsequent cases,[44] is sometimes called *Chevron* step zero.[45] It operates as "a kind of 'carve out' from *Chevron* deference."[46] Because *Chevron* deference was not appropriate in these extraordinary cases, the Court would revert to traditional judicial review principles and independently resolve the question of law, without deferring to the agency's reasonable interpretations.[47]

But *Brown & Williamson Tobacco Corp.* also introduced an alternative major-questions formulation: the major questions doctrine could preclude agency action on topics of economic and political significance, unless clearly authorized by Congress. Rather than conducting a *Chevron* deference analysis, the Court determined a "common sense" consideration of "the manner in which Congress [wa]s likely to delegate a policy decision of such economic and political magnitude to an administrative agency" should guide statutory interpretations.[48] Relying on this "common

[40] *Id.* at 231–32.
[41] 529 U.S. 120, 125–26 (2000).
[42] *Id.* at 159.
[43] *Id.* at 133.
[44] *See* Gonzales v. Oregon, 546 U.S. 243, 258-59 (2006); King v. Burwell, 576 U.S. 473, 485 (2015).
[45] *See generally* KOCH, JR. & MURPHY, supra note 9, § 11:34.15.
[46] *See* Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 482 (2021); *see also Major Questions Objections*, 129 Harv. L. Rev. 2191, 2193 (2016) (note).
[47] *Id.* at 482.
[48] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

sense," courts should recognize "that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[49] The Court subsequently adopted a clear statement rule for such cases in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014). When an agency seeks to take action with great economic and political significance, Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[50] Under this major questions strand, similarly reflected in a few other cases,[51] the issue is not merely the correct interpretation of an ambiguous statute, but whether Congress has delegated authority on the issue of economic and political significance. If Congress failed to provide a clear statement, courts should not independently resolve any statutory ambiguities because additional action from Congress is necessary.[52]

These were not the only major-questions-approaches posited. Some scholars have suggested the major questions doctrine is the nondelegation doctrine disguised as a method of statutory interpretation and the clear-statement rule effectively prohibits Congressional delegations on "major" issues.[53] Other scholars argued the major questions doctrine prevents agency self-aggrandizement.[54] The divergent opinions on the contours and purpose of the major questions doctrine shows the lack of clarity in the early cases. And, as a result, courts, agencies, and litigants lacked clear guidance on how to apply the doctrine.[55]

[49] *Id.* at 160.
[50] 573 U.S. 302, 324 (2014).
[51] *See* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2489 (2021); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. ___, 142 S. Ct. 661, 665 (2022).
[52] *See* Sunstein, *supra* note 46, at 483; *see also* Sohoni, *supra* note 2, at 264.
[53] *See* Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 Va. L. Rev. 174, 177 (2022); Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 445 Admin. L. Rev. 445, 463 (2016).
[54] *See* Monast, *supra* note 53, at 462–63.
[55] Richardson, *supra* note 53, at 195–06; *see also* Monast, *supra* note 53, at 464–65; Sunstein, *supra* note 26, at 193.

II. THE MAJOR QUESTIONS DOCTRINE ARTICULATED IN *WEST VIRGINIA V. EPA*

West Virginia v. EPA unequivocally recognized the major questions doctrine as a canon of statutory interpretation[56] and provided an analytical framework for major-questions cases. The decision did not, however, provide a precise standard for identifying when an agency action warrants a major-questions analysis. This Part summarizes the majority opinion in *West Virginia v. EPA* and Justice Gorsuch's concurrence.

The issue presented in *West Virginia v. EPA* was "whether the 'best system of emission reduction' identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act."[57] Section 111 of the Clean Air Act ("CAA") directed the EPA to identify categories of stationary sources that significantly cause or contribute to "air pollution, which may reasonably be anticipated to endanger the public health or welfare."[58] Under Section 111(b), the EPA must then promulgate a standard of performance on a pollutant-by-pollutant basis that adequately demonstrates the "best system of emission reduction" (BESR) for *new* sources.[59] Under Section 111(d), the EPA must then address emissions of the same pollutant by *existing* sources, if they are not already regulated under another CAA program.[60]

In 2015, the EPA announced two rules addressing carbon dioxide pollution: one establishing the BSER for new coal and gas plants, and the other establishing the BSER for existing coal and gas plants.[61] The latter was challenged in *West Virginia v. EPA*. The BSER for existing sources,

[56] 597 U.S. ___, 142 S. Ct. 2587 (2022); *see also* David Freeman Engstrom & John E. Priddy, West Virginia v. EPA *and the Future of the Administrative State*, STAN. LAW BLOG (July 6, 2022), https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/; *see also* Kristen E. Hickman, *Thoughts on* West Virginia v. EPA, YALE J. ON REG – NOTICE & COMMENT (July 5, 2022), https://www.yalejreg.com/nc/thoughts-on-west-virginia-v-epa/.
[57] 142 S. Ct. at 2615–16.
[58] *Id.* at 2601 (quoting 42 U.S.C. § 7411(b)(1)(A)).
[59] *Id.*
[60] *Id.*
[61] *Id.* at 2602.

also called the Clean Power Plan, included three building blocks: (1) practices coal plants could undertake to burn coal more efficiently; (2) generation shifting from coal to natural gas plants; and (3) generation shifting from coal and gas to wind and solar generators. The effect of the Clean Power Plan would be a "sector-wide shift in electricity production from coal to natural gas and renewable."[62] The Clean Power Plan never took effect because dozens of parties sought judicial review the same day the EPA promulgated the rule. And, after a convoluted procedural path, the Supreme Court granted certiorari.

Chief Justice Roberts, writing for the majority, held the EPA lacked authority under the Clean Air Act to adopt the Clean Power Plan as the BSER.[63] In doing so, the Court articulated the major questions standard and its justification:

> [I]n certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent makes [the Court] 'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there. To convince [the Court] otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency must instead point to clear 'clear congressional authorization' for the power it claims.[64]

The Court first noted the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall scheme."[65] And, where the statute confers authority upon an administrative agency, an inquiry into agency action must be shaped by "whether Congress in fact meant to confer" the asserted authority.[66] A clear statement

[62] *Id.* at 2603.
[63] *Id.* at 2616.
[64] *Id.*
[65] *Id.* at 2607.
[66] *Id.* at 2608.

for agency action on major questions is then justified when the statutory scheme demonstrates an agency interpretation is "extraordinary" and "common sense as to the manner in which Congress [would have been] likely to delegate such power to the agency at issue, ma[kes] it very unlikely that Congress had done so."[67] Major questions cases are a departure from "ordinary" cases involving agency interpretations and assertions of authority.[68]

The Court therefore set out a two-step framework for judicial review of administrative agency action. First, the court must determine whether the asserted agency action presents "a major questions case."[69] If so, "the Government must … point to 'clear congressional authorization' to regulate" in the asserted manner.[70] The terms "major questions case" and "extraordinary cases" are used interchangeably in articulating step one.[71] "Extraordinary cases" are defined as "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance' of that assertion provide a reason to hesitate before concluding that Congress' meant to confer such authority."[72] The Court highlighted several factors that indicate there may be a major questions case: (1) the agency "claimed to discover in a long-extant statute an unheralded power";[73] (2) the claimed power represented a "transformative expansion in [its] regulatory authority";[74] (3) the agency relied on an ancillary, rarely used provision;[75] (4) "Congress had conspicuously and repeatedly declined to enact" the regulatory program proposed by the agency;[76] (5) the agency lacked "comparative expertise" over the policy judgments;[77] and (6) the

[67] *Id.* at 2609 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[68] *See id.* at 2609.
[69] *See id.* at 2610.
[70] *Id.* at 2614.
[71] *Id.* at 2609–10.
[72] *Id.* at 2608 (internal quotation marks omitted) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159).
[73] *Id.* at 2610 (quoting Util. Air Grp. v. EPA, 573 U.S. 302, 324 (2014)).
[74] *Id.* (quoting *Util. Air Grp.*, 573 U.S. at 324).
[75] *Id.*
[76] *Id.*
[77] *Id.* at 2612.

proposed policy "has been the subject of earnest and profound debate across the country."[78] Applying these factors, the Court determined it had "a major questions case" and concluded the term "system" was not sufficient "clear congressional authorization" to regulate in the manner prescribed by the EPA Clean Power Plan.[79]

Justice Gorsuch, joined only by Justice Alito, in concurrence took a more expansive view of when a major questions case is presented. Rather than limiting the doctrine to "extraordinary cases" of agency action, Justice Gorsuch would invoke the major question doctrine, and require clear congressional authorization, for all "decisions of vast 'economic and political significance'" by administrative agencies.[80] At first this may not seem to be a significant distinction, but under Justice Gorsuch's approach, a major question case would exist when the agency resolves "a matter of great 'political significance'" *or* imposes significant economic regulations.[81] Unlike the multi-factor approach taken by the majority, Justice Gorsuch seems to suggest political *or* economic significance alone would trigger the major-questions-clear-statement rule, such that "an agency must point to clear congressional authorization."[82] This would likely encompass a broader swath of agency action. Justice Gorsuch recognizes as much by explaining the major question doctrine "took on a special importance" due to the "explosive growth of the administrative state" and seeks to prevent agencies from "churn[ing] out new laws more or less at whim."[83]

Although *West Virginia v. EPA* defined the overarching standard for major questions cases, the list of factors provided by the majority and the divergent approach advocated by Justice Gorsuch left open a significant question: What qualifies as a major-questions case?

[78] *Id.* at 2614.
[79] *Id.* at 2610, 2614.
[80] *Id.* at 2626 (Gorsuch, J., concurring).
[81] *Id.* at 2620 (quoting Nat'l Fed'n of Indep. Bus. v. OSHA, 142 S. Ct. 661, 665 (2022)).
[82] *Id.*
[83] *Id.* at 2618.

III. A JUDICIALLY ADMINISTRABLE TEST FOR IDENTIFYING MAJOR QUESTIONS CASES

Step one of the newly adopted major-questions inquiry requires a court to determine whether agency action presents an "extraordinary case[]."[84] But, as Justice Kagan emphasized in dissent, how court should conduct this inquiry remains unclear: a reviewing court must somehow "decide[] by looking at some panoply of factors."[85] Scholars similarly viewed the Court's guidance on how to decipher when agency action presents a major question insufficient.[86] Despite the "mushy" standard,[87] a judicially administrable test can be identified in *West Virginia v. EPA* and supported by major-questions precedent. This Part will first identify and reject incorrect or unwieldy approaches arising in the courts of appeals. It will then argue that the approach is hiding in plain sight in *West Virginia v. EPA.*

A. Erroneous Approaches to Identifying Major Question Cases

Courts of appeals have attempted to apply the major questions test articulated in *West Virginia v. EPA*, but the approaches lack a judicially-administrable standard or reflect an incorrect understanding of the major questions doctrine.

The Fifth Circuit has adopted two conflicting and incorrect approaches to identifying major question cases post-*West Virginia v. EPA*. First, in *Midship Pipeline Company, L.L.C. v. FERC*, 45 F.4th 867 (5th Cir. 2022), the Fifth Circuit relied on *West Virginia v. EPA* to hold the Natural Gas Act did not authorize FERC to determine reasonable costs of remediation for natural gas pipelines constructed on privately held land.[88] But the court did not conduct step-one of the major questions analysis. Instead, the decision rested on the overarching principle that "[a]gencies have

[84] *Id.* at 2609–10.
[85] *Id.* at 2634 (Kagan, J., dissenting).
[86] *See* Hickman, *supra* note 56 (describing the standard articulated as "mushy .. rather than a bright line rule"); Strict Scrutiny, *Just how bad is the Supreme Court's EPA decision?* (June 30, 2022), https://crooked.com/podcast/just-how-bad-is-the-supreme-courts-epa-decision/ (describing the decision as based on "vibes" about agencies).
[87] Hickman, *supra* note 56.
[88] *Id.* at 876-77.

only those powers given to them by Congress."[89] Based on this premise, the Fifth Circuit conducted a statutory interpretation and determined the Natural Gas Act did not authorize the power asserted by FERC.[90] The court did not consider any of the factors discussed in *West Virginia v. EPA*, including whether FERC's action implicated an issue of economic or political significance This approach conflicts with *West Virginia v. EPA* and the major questions doctrine because it disregards the emphasis placed on "extraordinary cases."[91] By failing to first determine whether the asserted agency action even presented an extraordinary case, the Fifth Circuit erroneously expanded the major questions doctrine from extraordinary cases to all agency actions.

In *Texas v. United States*, 50 F.4th 498 (5th Cir. 2022), the Fifth Circuit took a different approach by erroneously conflating the major questions doctrine and *Chevron*'s step-two.[92] There, the Fifth Circuit held DACA would fail step two of *Chevron* because DHS had unreasonably interpretated the INA.[93] The interpretation was unreasonable because DACA "implicates questions of deep economic and political significance" and there was "no 'clear congressional authorization' for the power that DHS claim[ed]."[94] While in prior cases the Court has blurred the line between the major questions doctrine and *Chevron* deference,[95] *West Virginia v. EPA* disentangled the major questions doctrine and *Chevron* analysis. In almost all prior major questions cases, the Court has used *Chevron* as the starting point for reviewing the administrative agency's statutory interpretations.[96] But *Chevron* was not cited or referenced at all by the majority opinion in *West*

[89] *Id. (*quoting *West Virginia v. EPA*, 142 S. Ct. at 2607).
[90] *Id.*
[91] *See West Virginia v. EPA*, 142 S. Ct. at 2609; *see, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
[92] *See* 50 F.4th at 526–27.
[93] *Id.* at 526
[94] *Id.*
[95] *See supra* Part I.C.; *see, e.g.*, Util. Air Reg. Grp. v. EPA, 573 U.S. 302 314 (2014).
[96] *See, e.g.*, King v. Burwell, 576 U.S. 473, 485 (2015). The Court departed from this approach in just two prior cases. *see* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2488–89 (2021) (conducting a statutory interpretation without discussion of *Chevron*); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S.

Virginia v. EPA. And the analytical framework applied was quite distinct. Under *Chevron*, the reviewing court begins with the text to determine whether Congress has directly spoken to the issue.[97] Under the major questions doctrine, the reviewing court begins with the agency action to determine whether it presents an "extraordinary case."[98] And, unlike the deferential treatment of implied delegations in *Chevron*,[99] the major questions doctrine "skepticism" to implied delegations and requires "clear congressional authorization."[100] By collapsing the major-questions analysis and *Chevron* step-two, the Fifth Circuit failed to appropriately analyze whether DACA presented an "extraordinary case" for the purposes of major questions analysis.

In contrast, the Eleventh Circuit applied the correct framework, but struggled to find a judicially-manageable test. In *Georgia v. President of the United States*, 48 F.4th 1283 (11th Cir. 2022), the Eleventh Circuit held the Procurement Act did not authorize agencies to insert a COVID-19 requirement into all procurement contracts and solicitations.[101] The court did not establish a clear test or relevant factors for identifying a major question but seemed to implicitly base its reasoning on three factors identified in *West Virginia v. EPA*. First, the agency claimed to discover an unheralded power to impose an "all-encompassing vaccine requirement" in the Procurement Act's "project specific restrictions."[102] Second, the claimed power represented a transformative expansion in the agency's power because the "general authority … to insert a term in every solicitation and every contract" was "worlds away" from "the sort of project-specific

____, 142 S. Ct. 661, 665–66 (2022) (same). Both of these decisions arose from the Court's emergency docket, also known as the shadow docket. As a result, the per curiam opinions lacked a comprehensive explanation of the Court's analytical approach. *See* Steve Vladeck, *Response: Emergency Relief During Emergencies*, 102 B.U. L. REV. 1787, 1788 (2022); Cashmere Cozart, *SCOTUS' Shadow Docket Coming Out of the Shadows*, UNIV. OF ILL. CHI. L. REV. (Sept. 12. 2021), https://lawreview.law.uic.edu/news-stories/scotus-shadow-docket-coming-out-of-the-shadows/.

[97] Chevron U.S.A. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).

[98] *West Virginia v. EPA*, 142 S. Ct. at 2608.

[99] See *Chevron*, 467 U.S. at 843.

[100] *West Virginia v. EPA*, 142 S. Ct. at 2614.

[101] 48 F.4th at 1296.

[102] *See id.* at 1296.

restrictions contemplated by the [Procurement] Act."[103] And, lastly, Congress had declined to enact legislation conferring this broad authority based on other statutes that impose "a particular economic or social policy among federal contractors through the procurement process," and the absence of a statutory provision imposing an "across-the-board vaccination mandate."[104] While this Eleventh Circuit analyzed the factors identified in *West Virginia v. EPA*, the approach lacks sufficient structure for consistent judicial administration. It is vulnerable to the criticism that courts will simply choose from some unclear "panoply of factors"[105] or make decisions based on "vibes."[106] Thankfully, *West Virginia v. EPA* and prior cases reveal a judicially-manageable test for identifying major questions cases.

B. Identifying Major Questions Cases Using West Virginia v. EPA*'s Dual-Element Test*

i. The dual-element test

In defining "extraordinary cases," *West Virginia v. EPA* impliedly identified a two-element test to determine when a major questions case is presented. The Court defined extraordinary cases based on the "history and the breadth of the authority that [the agency] has asserted, *and* the economic and political significance of that assertion.'"[107] This definition suggests major-questions cases satisfy two distinct elements: (1) the asserted authority is novel and extensive based on the "history and breadth of the authority that the agency has asserted" *and* (2) the asserted authority implicates issues of "economic and political significance."[108] The factors identified by the majority and prior major questions doctrine cases reveal how each element can be satisfied.

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[103] *See id.*
[104] *See id.* at 1297.
[105] *See West Virginia v. EPA*, 142 S. Ct. at 2634 (Kagan, J., dissenting).
[106] *See* Strict Scrutiny, *supra* note 86.
[107] *West Virginia v. EPA*, 142 S. Ct. at 2608 (emphasis added) (internal quotation marks omitted) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).
[108] *Id.*

Four factors identified in *West Virginia v. EPA* address whether an agency's action is novel and extensive in light of the history and breadth of the agency's authority: (1) the discovery of an unheralded power in a long-extant statute; (2) the power is a transformative expansion in the agency's regulatory authority; (3) the power is found in an ancillary provision; and (4) the agency lacks comparative expertise over the asserted power. Prior major-questions cases confirm that these factors are evidence of novel or extensive agency action.

An agency's discovery of an unheralded power in a long-extant statute demonstrates novelty because it is a departure from the agency's prior "established practice" and shows a historic "want of assertion of power."[109] In *West Virginia v. EPA*, the EPA "had never devised a cap by looking to a [generation-shifting] system," which indicated the current assertion of authority was a newfound power.[110] Framed differently: the absence of precedent for the asserted authority indicates it is novel.[111] For instance, in *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. ___, 141 S. Ct. 2485 (2021), the agency's claim of authority was "unprecedented" because no prior regulation under the provision, which was enacted in 1944, approached a similar "size or scope."[112]

A "transformative expansion in [the agency's] regulatory authority"[113] reflects both novelty and an extensive increase in authority. This factor can be shown by a "fundamental revision of the statute" [114] to enable regulation in a new area or industry.[115] The first major questions case, *MCI Telecommunications Corp.*, explains a "fundamental change" "depends to some extent on the

[109] *See id.* at 2610 (quoting FTC v. Bunte Brothers, Inc., 312 U.S. 349, 352 (1941)).
[110] *Id.*
[111] *See id.* at 2610; *see also* Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S. Ct. 2485, 2489 (2021); Nat'l Fed. of Indep. Bus. v. OSHA, 595 U.S. ____, 142 S. Ct. 661, 666 (2022).
[112] 141 S.Ct. at 2489.
[113] *West Virginia v. EPA*, 142 S. Ct. at 2610.
[114] *Id.* at 2611 (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).
[115] *See, e.g.*, FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 146 (2000).

importance of the item changed to the whole."[116] When an agency action revises a provision with "enormous importance" to the statutory scheme or "'central' to administration" of the statute, it introduces a "new regime of regulation" that "is not the one that Congress established."[117] By changing the regulatory regime, the agency is asserting regulatory authority over a new area or sector.[118] In *West Virginia v. EPA*, this "fundamental revision" was evidenced by transitioning from regulating the performance of individual sources to regulating the emissions of a sector as a whole.[119]

When the newfound power is located in an "ancillary" or rarely-used provision of the Act,[120] it supports a finding of novelty. The provision relied on by the EPA in *West Virginia v. EPA* was characterized as the "backwater" of the Section because it had been used "only a handful of times" and was "designed to function as a gap filler."[121] In the past, the Court has also found ancillary provisions to contain "express limitation[s]" or address other agency's roles in the regulatory scheme.[122] For instance, in *Gonzalez v. Oregon*, 546 U.S. 243 (2006), a provision authorizing the Attorney General to deny, suspend, or revoke physician's registrations was an express limitation that did not authorize medical judgments because those judgments were delegated to the Secretary of Health and Human Services.[123] Relying on an ancillary provision suggests the action is novel or broad because it introduces a new basis for action and may encroach on another agency.

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[116] *MCI Telecomms. Corp.*, 512 U.S. at 229.
[117] *Id.* at 234.
[118] *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 146 (tobacco); Gonzalez v. Oregon, 546 U.S. 243, 261 (2006) (criminalization of medical professionals); Nat'l Federation of Indep. Business v. OSHA, 595 U.S. ____, 142 S. Ct. 661, 665 (2022) (hazards of daily life); Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2488 (2021) (downstream connections to the spread of disease).
[119] *Id.*
[120] *West Virginia v. EPA*, 142 S. Ct. at 2610 (quoting Whitman v. American Trucking Ass'n, 531 U.S. 457, 468 (2001)).
[121] *Id.* at 2602, 2610, 2613.
[122] *See Gonzalez*, 546 U.S. at 266–67.
[123] *Id.*

When the agency lacks "comparative expertise" over the asserted policy judgments,[124] the proposed action may be novel and extensive. Generally, "Congress intend[s] to invest interpretive power in the administrative actor in the best position" to exercise such judgment.[125] Where the agency lacks expertise or experience, they are impliedly acting outside their area of knowledge and diverging from their historical practices. In *West Virginia v. EPA*, EPA lacked the necessary "technical and policy expertise" "in areas such as electricity transmission, distribution, and storage."[126] The Court has also relied on an absence of expertise in prior major-questions cases when the Attorney General sought to make medical judgments[127] and the IRS sought to craft health care policy.[128]

West Virginia v. EPA and major-questions precedent also explain how the second element, economic and political significance, can be satisfied. Although the conjunction "and" suggests both economic and political significance is necessary, past cases point to the opposite conclusion.[129] Either economic or political significance is sufficient to satisfy the second element. First, an agency action presents issues of economic significance when it regulates a significant portion of a major American industry;[130] requires billions of dollars in private spending or administrative costs;[131] and/or affects the economic decisions of millions of Americans.[132] In *West*

[124] *West Virginia v. EPA*, 142 S. Ct. at 2613.
[125] *See Gonzalez*, 546 U.S. at 266.
[126] *West Virginia v. EPA*, 142 S. Ct. at 2612.
[127] *Gonzalez*, 546 U.S. at 267.
[128] King v. Burwell, 576 U.S. 473, 486 (2015).
[129] *See, e.g.*, *Gonzalez*, 546 U.S. at 267–68 (addressing only political significance); *Util. Air Reg. Grp.*, 573 U.S. at 322–24 (addressing only economic significance).
[130] *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994) (agency action would effect 40% of a major sector of the telecommunications industry); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (regulation would apply to an industry constating a significant portion of the American economy); *Util. Air Reg. Grp.*, 573 U.S. at 324.
[131] *See Util. Air Reg. Grp.*, 573 U.S. at 324 (regulations would impose $21 billion in administrative costs and $147 billion in permitting costs); *see also King*, 576 U.S. at 485; Ala. Ass'n. of Realtors v. Dep't of Health and Human Servs., 594 U.S. ___, 141 S.Ct. 2485, 2489 (2021).
[132] *See King*, 576 U.S. at 485.

Virginia v. EPA, the Clean Power Plan had economic significance because it would assert "unprecedented power of American industry" and would "entail billions of dollars in compliance costs," which would then affect energy prices for Americans.[133] And, in *King v. Burwell*, 576 U.S. 473 (2015), a regulation that would affect the price of health insurance for millions of people had sufficient economic significance.[134]

Second, political significance can be shown by Congressional action or inaction regarding the specific program, prominent debate surrounding the issue, and/or tension with state law or authority. First, *West Virginia v. EPA*, and past decisions, have placed significant emphasis on whether "Congress had conspicuously and repeatedly declined to enact" the regulatory program proposed by the agency[135] because the presence of debate or contrary legislation in Congress indicates the "importance of the issue."[136] Second, the issue is politically significant when it has been the "subject of earnest and profound debate across the country"[137] because "political and moral debate" surrounding an issue demonstrates its importance to the public.[138] Third, political significance is shown when the agency action intrudes on a particular domain of state law.[139] In *Alabama Association of Realtors*, the Court identified intrusion on a "particular domain of state law" as a significant non-financial issue because it would "alter the balance between federal and state power."[140]

[133] *West Virginia v. EPA*, 142 S. Ct. at 2604, 2612.
[134] 576 U.S. at 485.
[135] *West Virginia v. EPA*, 142 S. Ct. at 2610; *see also Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60; *Gonzalez*, 546 U.S. at 267–68; *Ala. Ass'n. of Realtors*, 141 S.Ct. at 2486–87.
[136] *See West Virginia v. EPA*, 142 S. Ct. at 2614.
[137] *Id.*; *see also Gonzalez*, 546 U.S. at 267–68.
[138] *Gonzalez*, 546 U.S. at 249, 267.
[139] *Ala. Ass'n. of Realtors,* 141 S. Ct. at 2489.
[140] *Id.*

ii. The legal and logical case for the dual-element test

The test requires a sufficient demonstration that the agency action (1) is novel and extensive based on the history and breadth of authority *and* (2) implicates issues of economic and political significance. Requiring a major-questions case to satisfy both elements aligns with precedent; serves the "common sense" justification of the major questions doctrine; and provides an objective approach which enables consistent judicial administration.

Although the test was not formulated until *West Virginia v. EPA*, every prior major-questions case has satisfied both elements. For the past thirty-years, the Court has only conducted major-questions analysis when the cases involves both a novel or extensive agency action *and* political or economic significance.[141] Although the exact phrasing of the elements and supporting factors varies, the common threads are clear. And, in formulating each factor, *West Virginia v. EPA* heavily relied on and interpreted the prior cases.[142] This also undermines the approach advocated by Justice Gorsuch. In no case is political *or* economic significance *alone* sufficient to render the case "extraordinary."[143]

The dual-element test ensures the major questions doctrine is only applied in "extraordinary cases" where common sense warrants skepticism of whether Congress delegated authority. An indeterminate and unclear standard could encompass ordinary cases of agency action. If the major

[141] *See, e.g., MCI Telecomms. Corp.*, 512 U.S. 218, 231 (1994) (explaining agency action constituted "fundamental revision" and affected 40% of a major sector of the industry); *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 146, 159–60 (2000) (explaining agency action constituted an expansion into the tobacco industry, discovered a new power in a statute, regulated an industry constituting a significant portion of American economy, and Congress had declined to enact such a scheme); *Gonzalez*, 546 U.S. 243, 249, 260–61, 266–67 (2006) (explaining agency action constituted a transformation of the limits placed on the Attorney General to allow regulation in a new area, was outside the expertise of the Attorney General, relied on an ancillary provision, had been the subject of earnest and profound debate, and intruded on state law); *Ala. Ass'n. of Realtors*, 141 S.Ct. at 2488 (explaining agency action constituted a transformative expansion in authority, asserted a unprecedented power, had significant economic impact, and intruded on state law).
[142] *See West Virginia v. EPA*, 142 S. Ct. at 2608–2614.
[143] *See id.* at 2618–26 (Gorsuch, J., concurring).

doctrine required "clear congressional authorization" for mundane and traditional exercises of administrative agency power, it could interfere with the separation of powers by restricting Congress' ability to legislative freely, including authorizing administrative agencies to fill in the gaps of legislation. But a novel or broad assertion of authority is coupled with an issue of significant political or economic importance creates skepticism because it prevents executive branch aggrandizement absent clear congressional authorization. By limiting the major questions doctrine to "extraordinary cases," administrative agencies are cabined within their legislative authority, but courts are not overreaching.

Judicial administration is also bolstered by the test because it relies on objective factors and introduces a clear threshold requirement. A major questions case cannot be demonstrated by a mere showing of some indeterminate degree of political or economic significance. Rather, the agency action must reflect a departure from ordinary agency practice under the first element. And the political and economic implications are not theoretical "vibes," but grounded in an objective showing of political debate, conflicts with state law, or extensive private or public costs.

This test has already been applied, admittedly without extensive analysis or reasoning, in the D.C. Circuit. *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), held a rule requiring New England fisheries to fund at-sea monitoring programs promulgated by the National Marine Fisheries Service pursuant to its authority to establish "fishery management plans" under the Magnuson-Stevens Fishery Conservation and Management Act did not constitute a major questions case.[144] Judge Rogers, joined by Chief Judge Srinivasan, determined the major

[144] 45 F.4th 359, 363–64 (D.C. Cir. 2022). After this paper was drafted, the Supreme Court granted certiorari in *Loper Bright Enterprises, Inc. v. Raimondo* to address "whether the court should overrule *Chevron*, or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency." *See* Loper Bright Enters. v, Raimondo, No. 22-451 (cert. granted May 1, 2023).

questions doctrine "applies *only*" when the "history and breadth of the authority that [the agency] has asserted *and* the economic and political significance of the assertion" demonstrate an "extraordinary case[]."[145] The monitoring program failed to meet this standard because the National Marine Fisheries Service had "expertise and experience within [the] specific industry" and the agency did not claim "broader power to regulate the national economy."[146] Also, while the Eleventh Circuit did not rely on the two-element framework in *Georgia v. President of the United States*, the court's decision did rely on a showing of both novel or extensive action *and* issues of political or economic significance.[147] These early cases forecast judicial administration may be possible based on the dual-element requirement and objective factors derived from *West Virginia v. EPA*.

CONCLUSION

Admittedly, one aspect of this test remains unclear. Due to varying approaches across cases, it is unclear how many factors are necessary to demonstrate each element. For instance, could a lack of expertise alone demonstrate an agency action was novel and extensive? While in almost all cases multiple factors demonstrated a departure from ordinary agency action, in *King v. Burwell*, the IRS' lack of expertise in health care policy alone seemed sufficient.[148] This question will need to be answered, but the dual-element test set out in *West Virginia v. EPA* creates the beginnings of a judicially administrable standard for identifying major questions cases.

[145] *Id.* at 364 (emphasis added) (internal quotation marks omitted) (quoting *West Virginia*, 142 S. Ct. at 2595).
[146] *Id.*
[147] Georgia v. President of the United States, 48 F.4th 1283, 1296 (11th Cir. 2022).
[148] King v. Burwell, 576 U.S. 473, 485 (2015)

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Date of JD/LLB	**June 16, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

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June 12, 2023

The Honorable Jamar Walker
United States District Court for the
Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at Stanford Law School and I write to apply for a clerkship in your chambers in 2024-25. After spending most of my life overseas, I returned to Virginia to attend the University of Virginia for my undergraduate degree. Now, I am eager to return to Virginia once again to clerk, and I hope to stay for the rest of my career. I spoke with Professor Brandon Hasbrouck and he spoke glowingly of you. Speaking with him made me even more excited about the opportunity to clerk for you.

Enclosed please find my resume, references, law school transcript, and writing sample for your review. Professor Bernadette Meyler, Professor Jane Schacter, and Professor Rabia Belt are providing letters of recommendation in support of my application.

I welcome the opportunity to discuss my qualifications further. Thank you for your consideration.

Sincerely,

Sarah Corning

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EDUCATION

Stanford Law School, Stanford, CA — J.D., expected June 2024

Honors: Sallyanne Payton Academic Fellow (selected to receive mentorship in pursuing legal academia)
Journal: *Stanford Journal of Civil Rights & Civil Liberties* (Vol. 19: Senior Editor)
Activities: Teaching Assistant for Constitutional Law; Research Assistant to Professor Bernadette Meyler; Research Assistant to Professor Rabia Belt; Research Assistant to Professor Joanna Grossman; Research Assistant to Professor David Sklansky, Domestic Violence Pro Bono Project

University of Virginia, Charlottesville, VA — B.A., *highest honors*, in Political and Social Thought, May 2020

Honors: Distinguished Major Program, Raven Society, Harrison Research Award, Lawn Resident
Thesis: "Legislating Abortion in the Heartlands: How Missouri Shaped Anti-Abortion Law in the United States"
Activities: *Wilson Journal of International Affairs* (Vol. 28-29: Editor-in-Chief); Power, Violence, and Inequality Collective (Research Assistant); Legal Aid Justice Center (Caseworker and Translator)

EXPERIENCE

ACLU Center for Liberty — New York, New York
Intern — June – August 2023

Office of the California Attorney General — San Diego, CA
Intern, Civil Rights Enforcement and Children's Justice Bureau — June – August 2022
Drafted memoranda interpreting issues arising from ongoing litigation and government investigations, analyzing Title IX protections and California's Equal Protection doctrine, and recommending arguments for appeal. Conducted investigations, presented findings, and recommended next steps in writing and in meetings.

A Better Childhood — New York, NY
Paralegal — June 2020 – June 2021
Prepared legal and factual research reports, drafted memoranda, and managed document review. Sole paralegal covering ten active federal class-action lawsuits with the goal of childwelfare system reform.

Period Equity — New York, NY
Intern — June 2019 – August 2019
Joined the first menstrual equity law and policy group on campaign targeting 35 states with "tampon tax." Researched the legislative landscape in those states, created an organizational database, wrote op-eds for education and advocacy, and conducted analysis for the legal team.

United Nations — Chiapas, Mexico
Researcher — July – August 2018
Prepared report detailing the gender-based violence migrants face and the human trafficking implications in Tapachula, Chiapas, the major migrant town in the south of Mexico. Engaged in bilingual research, conducting interviews in Spanish with migrants, community leaders, civil society, organizations, and government agencies.

National Center for Civil and Human Rights — Atlanta, GA
Research Intern — June – August 2018
Researched the Rohingya Muslim minority group in Myanmar, addressing the human rights abuses and the international legal implications.

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The Rohingya: A Stateless Minority Seeking Refuge, Wilson Journal of International Affairs, Fall 2017.
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Program : Law JD
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Plan
Status Active in Program

--------- Beginning of Academic Record ---------

2021-2022 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	201	CIVIL PROCEDURE I	5.00	5.00	P	
Instructor:		Sinnar, Shirin A				
LAW	205	CONTRACTS	5.00	5.00	P	
Instructor:		Fried, Barbara H				
LAW	219	LEGAL RESEARCH AND WRITING	2.00	2.00	P	
Instructor:		Valeska, Tyler Breland				
LAW	223	TORTS	5.00	5.00	P	
Instructor:		Sykes, Alan				
LAW	240Q	DISCUSSION (1L): HUMAN REPRODUCTION IN THE 21ST CENTURY: LEGAL AND ETHICAL ISSUES	1.00	1.00	MP	
Instructor:		Greely, Henry T				

LAW TERM UNTS: 18.00 LAW CUM UNTS: 18.00

2021-2022 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	203	CONSTITUTIONAL LAW	3.00	3.00	H	
Instructor:		Meyler, Bernadette				
LAW	207	CRIMINAL LAW	4.00	4.00	P	
Instructor:		Sklansky, David A				
LAW	224A	FEDERAL LITIGATION IN A GLOBAL CONTEXT: COURSEWORK	2.00	2.00	P	
Instructor:		Handler, Nicholas A				
LAW	3507	LAW AND THE RHETORICAL TRADITION	3.00	3.00	P	
Instructor:		Sassoubre, Ticien Marie				
LAW	5801	LEGAL STUDIES WORKSHOP	1.00	1.00	MP	
Instructor:		Fried, Barbara H Meyler, Bernadette				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 31.00

2021-2022 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	217	PROPERTY	4.00	4.00	P	
Instructor:		Kelman, Mark G				
LAW	224B	FEDERAL LITIGATION IN A GLOBAL CONTEXT: METHODS AND PRACTICE	2.00	2.00	H	
Instructor:		Handler, Nicholas A				
LAW	7010B	CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT	3.00	3.00	H	
Instructor:		Schacter, Jane				
LAW	7013	GENDER, LAW, AND PUBLIC POLICY	3.00	3.00	P	
Instructor:		Russell, Margaret Mary				

LAW TERM UNTS: 12.00 LAW CUM UNTS: 43.00

2022-2023 Autumn

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	808V	POLICY PRACTICUM: MOVING FORWARD FROM DOBBS	3.00	3.00	H	
Instructor:		Mukamal, Deborah A Weisberg, Robert				
Transcript Note:		John Hart Ely Prize for Outstanding Performance				
LAW	2002	CRIMINAL PROCEDURE: INVESTIGATION	4.00	4.00	P	
Instructor:		Weisberg, Robert				
LAW	3504	U.S. LEGAL HISTORY	3.00	3.00	P	
Instructor:		Ablavsky, Gregory R				
LAW	7108	STATE CONSTITUTIONAL LAW	3.00	3.00	P	
Instructor:		Schacter, Jane				

LAW TERM UNTS: 13.00 LAW CUM UNTS: 56.00

2022-2023 Winter

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	400	DIRECTED RESEARCH	2.00	0.00		
Instructor:		Douek, Evelyn				
LAW	2401	ADVANCED CIVIL PROCEDURE	3.00	3.00	P	
Instructor:		Zambrano, Diego Alberto				
LAW	7011	CONSTITUTIONAL LITIGATION	2.00	2.00	P	
Instructor:		Risher, Michael T				
LAW	7021	FAMILY LAW	3.00	3.00	H	
Instructor:		Grossman, Joanna Lynn				

Worksheet - For office use by authorized Stanford personnel Effective Autumn Quarter 2009-10, units earned in the Stanford Law School are quarter units. Units earned in the Stanford Law School prior to 2009-10 were semester units. Law Term and Law Cum totals are law course units earned Autumn Quarter 2009-10 and thereafter.

Leland Stanford Jr. University
School of Law
Stanford, CA 94305
USA

Law Unofficial Transcript

Name : Corning,Sarah Frances
Student ID : 06107401

LAW TERM UNTS: 8.00 LAW CUM UNTS: 64.00

2022-2023 Spring

Course		Title	Attempted	Earned	Grade	Eqiv
LAW	922A	YOUTH AND EDUCATION LAW PROJECT: CLINICAL PRACTICE	4.00	0.00		
Instructor:		Koski, William Sheldon Trillin, Abigail				
LAW	922B	YOUTH AND EDUCATION LAW PROJECT: CLINICAL METHODS	4.00	0.00		
Instructor:		Koski, William Sheldon Trillin, Abigail				
LAW	922C	YOUTH AND EDUCATION LAW PROJECT: CLINICAL COURSEWORK	4.00	0.00		
Instructor:		Koski, William Sheldon Trillin, Abigail				

LAW TERM UNTS: 0.00 LAW CUM UNTS: 64.00

END OF TRANSCRIPT

StanfordLawSchool

JENNY S. MARTINEZ
Richard E. Lang Professor of Law and Dean

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Stanford Grading System

Dear Judge:

Since 2008, Stanford Law School has followed the non-numerical grading system set forth below. The system establishes "Pass" (P) as the default grade for typically strong work in which the student has mastered the subject, and "Honors" (H) as the grade for exceptional work. As explained further below, H grades were limited by a strict curve.

H	Honors	Exceptional work, significantly superior to the average performance at the school.
P	Pass	Representing successful mastery of the course material.
MP	Mandatory Pass	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
MPH	Mandatory Pass - Public Health Emergency*	Representing P or better work. (No Honors grades are available for Mandatory P classes.)
R	Restricted Credit	Representing work that is unsatisfactory.
F	Fail	Representing work that does not show minimally adequate mastery of the material.
L	Pass	Student has passed the class. Exact grade yet to be reported.
I	Incomplete	
N	Continuing Course	
[blank]		Grading deadline has not yet passed. Grade has yet to be reported.
GNR	Grade Not Reported	Grading deadline has passed. Grade has yet to be reported.

In addition to Hs and Ps, we also award a limited number of class prizes to recognize truly extraordinary performance. These prizes are rare: No more than one prize can be awarded for every 15 students enrolled in a course. Outside of first-year required courses, awarding these prizes is at the discretion of the instructor.

* The coronavirus outbreak caused substantial disruptions to academic life beginning in mid-March 2020, during the Winter Quarter exam period. Due to these circumstances, SLS used a Mandatory Pass-Public Health Emergency/Restricted Credit/Fail grading scale for all exam classes held during Winter 2020 and all classes held during Spring 2020.

For non-exam classes held during Winter Quarter (e.g., policy practicums, clinics, and paper classes), students could elect to receive grades on the normal H/P/Restricted Credit/Fail scale or the Mandatory Pass-Public Health Emergency/Restricted Credit/Fail scale.

The five prizes, which will be noted on student transcripts, are:

- the Gerald Gunther Prize for first-year legal research and writing,
- the Gerald Gunther Prize for exam classes,
- the John Hart Ely Prize for paper classes,
- the Hilmer Oehlmann, Jr. Award for Federal Litigation or Federal Litigation in a Global Context, and
- the Judge Thelton E. Henderson Prize for clinical courses.

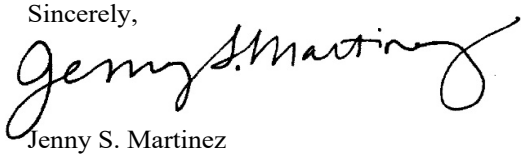
Unlike some of our peer schools, Stanford strictly limits the percentage of Hs that professors may award. Given these strict caps, in many years, *no student* graduates with all Hs, while only one or two students, at most, will compile an all-H record throughout just the first year of study. Furthermore, only 10 percent of students will compile a record of three-quarters Hs; compiling such a record, therefore, puts a student firmly within the top 10 percent of his or her law school class.

Some schools that have similar H/P grading systems do not impose limits on the number of Hs that can be awarded. At such schools, it is not uncommon for over 70 or 80 percent of a class to receive Hs, and many students graduate with all-H transcripts. This is not the case at Stanford Law. Accordingly, if you use grades as part of your hiring criteria, we strongly urge you to set standards specifically for Stanford Law School students.

If you have questions or would like further information about our grading system, please contact Professor Michelle Anderson, Chair of the Clerkship Committee, at (650) 498-1149 or manderson@law.stanford.edu. We appreciate your interest in our students, and we are eager to help you in any way we can.

Thank you for your consideration.

Sincerely,



Jenny S. Martinez
Richard E. Lang Professor of Law and Dean

Updated May 2020

Bernadette Meyler
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Professor, by courtesy, English
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June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am thrilled to have the opportunity to recommend Sarah Corning for a clerkship in your chambers. Sarah has worked extensively for me as a research and teaching assistant and has participated in several of my classes. In all of these roles, Sarah has been outstanding. She exemplifies the characteristics of intellectual curiosity, perseverance, thoroughness and good cheer. These attributes will, I believe, make her both a first-rate law clerk and a pleasure to have in chambers.

I invited Sarah to serve as a teaching assistant for my first-year Constitutional Law class this past Winter after finding her to be a truly exceptional research assistant during the summer of 2022. She had already demonstrated herself an enthusiastic participant in both Constitutional Law and the Legal Studies Workshop during her 1L year.

At Stanford, the required first-year Constitutional Law class covers largely constitutional structure as well as the Second Amendment, leaving the First and Fourteenth Amendments for upper class courses. During Constitutional Law, Sarah always had insightful contributions and asked about the implications of the cases beyond their immediate context. She also wrote an excellent exam, which earned her an H in the class. In the Legal Studies Workshop, participants present academic work in progress, whether drafts of notes for law reviews or more interdisciplinary pieces. Sarah demonstrated her already developed academic expertise in this context and furnished valuable feedback on other students' contributions.

In office hours for these classes, I had learned of Sarah's longstanding interest in issues of reproductive justice and her experience working on related topics as well as her desire to pursue a legal academic career. Anticipating after the leak of the draft opinion in *Dobbs* that I would engage in some writing as well as workshops and public media around the final decision, I asked Sarah to serve as a research assistant for me last summer.

Her efforts in this capacity far exceeded my greatest hopes for what she might accomplish. In the aftermath of *Dobbs*, I was invited to write several opinion pieces—including for the *SF Chronicle*—and to speak on NPR, at the grand rounds for Stanford Medical School, on a panel organized by Brookings, and in many other contexts. I was particularly interested in delving into the legal aftermath of *Dobbs* and its implications both for other established substantive due process rights and for how the rights of individuals traveling between states or receiving medication interstate would be treated. Sarah furnished comprehensive analysis for me both of ongoing developments in caselaw in the aftermath of *Dobbs* and of the various possibilities for how interjurisdictional disputes over abortion might be handled. She did so in an invariably timely manner, working with great ease on tight deadlines. As a result, I came to place absolute faith in her ability to track down answers (or, in their absence, highlight divergent possibilities) in short order.

For all of these reasons, I invited her to serve as my one of my teaching assistants for the first-year class in Constitutional Law. Each year, I tend to significantly modify my class depending on recent and pending Supreme Court decisions. This year, I invited my TAs to think about what additions and subtractions might make sense in light of current jurisprudence. We ultimately decided to add units on the Dormant Commerce and Interstate Compact Clauses in light of the Supreme Court's consideration of *National Pork Producers Council v. Ross* and *New York v. New Jersey*, which dealt with these two areas of the Constitution. Sarah was invaluable in collecting cases on the Dormant Commerce Clause that I could assign and helping to prepare materials for the in-class moot that we held inspired by the *National Pork Producers Council* case. She highlighted precisely the issues of significance in the cases she compiled and assisted students greatly in their preparations for the moot.

Sarah was enthusiastic about teaching part of a class given her academic aspirations, and she took on the discussion of the case of *Printz v. United States* and other decisions related to the issue of executive-branch commandeering. Her pedagogy was not only doctrinally accurate and clear but also funny and engaging. She conducted the session with authority and grace and was able to play off of student questions in order to pivot effectively back to points she wished to touch upon. Sarah expertly led the class through a challenging hypothetical and I could see how it helped the doctrine to click into place for students. One of the challenges of teaching Constitutional Law is that not all students arrive at law school with the same background knowledge about U.S. institutions; Sarah elegantly wove the relevant details into her discussion in a way designed to inform those who might need more context but not to bore others already steeped in U.S. history or government. Sarah is clearly already a masterful teacher, with full command of issues in Constitutional Law as well as a range of other subjects.

I don't ask the students to evaluate the teaching assistants, but several spontaneously praised Sarah either verbally or via e-mail at the end of the course. One wrote that "Sarah clearly knows her stuff. She explained complicated cases and concepts with remarkable clarity" and another remarked that "Sarah is very warm, inviting, and kind. Just one anecdote: she held my newborn in the courtyard one afternoon as she explained *National Pork Producers* to me, making me feel like I and my family belong here."

I hope that all of this indicates the level of Sarah's commitment to learning as well as conveying the law and her always friendly perseverance as she does so. Her cooperative and engaging manner as well as her legal expertise and writing skills will, I believe, render her a first-rate law clerk. If I can be of any additional assistance in your evaluation of her candidacy for a clerkship in your chambers, please do not hesitate to call my cell at (718)753-4456 or to send me an e-mail at bmeyler@law.stanford.edu.

Sincerely,

/s/ Bernadette Meyler

Jane S. Schacter
William Nelson Cromwell Professor of Law
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schacter@law.stanford.edu

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write with great enthusiasm to recommend Sarah Corning as a law clerk. Sarah is a passionate, smart, focused and committed student at Stanford Law School and her application to be a law clerk has my strong support.

I have taught Sarah in two classes—Constitutional Law: The Fourteenth Amendment (in the spring of 2022) and State Constitutional Law (in the fall of 2022). The Fourteenth Amendment class focuses mostly on equal protection and due process, and is a challenging class these days, with so much doctrine in flux at the Supreme Court. State Constitutional Law focuses on the neglected, but vibrant body of state constitutional law and explores a host of questions, from doctrinal issues to debates about elected judges, constitutional amendments at the ballot box, and how state courts do and should interpret their constitutions. In the two years I have now taught State Con Law, there has been high student interest and the class has drawn many of our top students

Sarah shone in both classes. I got to know her better than many of her peers because she sought me out after class at the podium or came to office hours to pursue points of interest to her. These are both hallmarks of engaged students with a strong interest in, and affinity for, the law. The sophistication of the questions she asked after class was striking. While some student questions are intended simply to make sure they understood the readings and class discussions, Sarah's questions often went beyond those sources to new and interesting places. I can particularly remember several engaged and insightful conversations I had with Sarah about the leak of the *Dobbs* draft opinion, which took place during the quarter in which she was taking Fourteenth Amendment. Sarah has a strong interest in reproductive autonomy, gender, and equality, and deep knowledge in those areas. I was very impressed with her observations.

In both classes, Sarah displayed the ability to balance mastery of the doctrine with a sharp critical eye on where that doctrine went astray. She excels at both tasks and, importantly, understands the difference between them. In addition, I saw on the exams strong, lucid and precise writing and excellent lawyerly judgment in sorting through complex issues. Sarah received an H grade in Fourteenth Amendment, and a P in State Con Law. As you may know, we grade on a strict curve and have a very strong student body, so I don't attach much weight to a P v. H.

Indeed, Sarah's strong intellectual chops have led to her selection as only one in five students to receive a Sallyanne Payton Fellowship based on her strong academic potential, and it is richly deserved in her case. She has held multiple research assistantships for colleagues of mine, sought out research and writing projects at every turn, served as Senior Editor of the *Stanford Journal of Civil Rights & Civil Liberties*, and secured summer jobs with the California Department of Justice and the ACLU that allow her to pursue her interests in gender and reproductive issues. She is focused, energetic, hard-working and passionate in her interests.

Sarah grew up mostly abroad. Her family moved permanently back to the United States only when she was a sophomore in high school. I think this background gives her a rich and interesting perspective on law, and also gives her a seasoned maturity that will serve her well in a clerkship and in her career after that.

I should add that, in addition to her abundant professional talents, Sarah is a completely delightful person. She is amiable, curious and warm. I think she will make a terrific co-clerk and addition to chambers.

In sum, I recommend Sarah to you with enthusiasm and without reservation, and hope very much that you pursue her application.

Please feel free to contact me by phone (650-724-9492) or e-mail (schacter@law.stanford.edu) if I can provide further assistance.

Sincerely,

/s/ Jane S. Schacter

Rabia Belt
Associate Professor of Law
Professor (by courtesy) of History
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June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in strong support of Sarah Corning's application for a clerkship in your chambers. Sarah has been a research assistant for me since 2022. She has helped me with a book project and will help me develop a new course for next year. I strongly recommend her, and very much hope you give her application close consideration.

Sarah has been an incredible research assistant, demonstrating the ability to produce stellar work under time pressure; a strong work ethic; and unflagging enthusiasm. She assisted me in finishing my forthcoming legal history book, *Disabling Democracy in America: Disability, Citizenship, Voting, and the Law, 1819-1920* [Cambridge Series in Legal History]. She conducted research on state voting assistance rules and legal challenges. She provided broader feedback on shaping the manuscript. She line-edited chapter drafts. This is a tricky book, that encompasses over a century of legal and historical research covering the entire nation, and then links this work to contemporary aspects of disability and voting. Additionally, I was completing this work as I was physically debilitated and in advance of a long overdue surgery. Sarah not only stepped up to provide a truly astounding amount of editorial assistance, but she also, on her own initiative, assembled my other research assistants into a cohesive team, with a production plan and method for cohesive feedback. I am very grateful for her work; she truly made mine better. Also, I think that her interactions with me indicated that she would be a fantastic clerk. She had great attention to detail, and cheerfully offered feedback to my writing. Her talent was not just about grammatical fixes [although she also provided those] but sharpened the book's arguments as well.

I am excited to use her creative legal talents for developing my new course, "Unreasonable People," an exploration of legal attempts to clarify those who are mentally competent to receive full legal accountability, and those who are not. We have already had wide-ranging conversations in brainstorming the content for the class. Sarah is delightful and whip smart. I think she will be a joy to have in chambers.

If you have any questions, I am happy to answer them. I can be reached on my cell phone, 734-308-7252, or by email at belt@law.stanford.edu.

Sincerely,

/s/ Rabia Belt

SARAH CORNING

(404) 372 0998 | 566 Arguello Way, Stanford, CA 93405 | scorning@stanford.edu

WRITING SAMPLE

I wrote the attached writing sample as an assignment during my summer internship with the California DOJ Civil Rights Enforcement Section & Children's Justice Bureau. The assignment required drafting two sections of California's "Comment on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance." The two sections I wrote addressed (1) the Proposed Rule's clarification on the scope of "sex discrimination," and (2) the Proposed Rule's changes to the Title IX grievance procedures for K-12 schools.

I received permission from CA DOJ to use this as a writing sample. I do not have permission share the earlier draft of the sections because it is confidential CA DOJ work product. I independently researched and wrote the two sections. It was then proofread, and I was directed to include a paragraph on the future Title IX athletics rulemaking before submission as final comment letter. Sections of the letter that were not written by me have been redacted.

B. The Proposed Rule clarifies the scope of "sex discrimination" in accordance with Title IX, Supreme Court precedent, and historical Department practice.

The Proposed Rule appropriately clarifies that "sex discrimination," as defined and prohibited by Title IX, includes "discrimination on the basis of sex stereotypes, sex characteristics . . . , sexual orientation, and gender identity."[178] This clarification effectuates Title IX by ensuring protection of LGBTQI+ students, who are at greater risk of lower educational achievement due to sex discrimination, and by ensuring that enforcement of the statute aligns with the Department's historical practice and Supreme Court precedent.

The protections in the rule are essential because LGBTQI+ students who experience discriminatory policies and practices have "lower levels of educational achievement, lower grade point averages, and lower levels of educational aspiration than other students."[179] LGBTQI+ students who experienced sex-based discrimination at school were found to be almost three times as likely to miss school as their non-LGBTQI+ classmates because they felt unsafe or uncomfortable.[180] LGBTQI+ students face prevalent discrimination in school, including sexual harassment.[181] For example, transgender youth experience higher levels of discrimination, violence, and harassment than cisgender youth. Of students known or perceived as transgender, 77% reported negative experiences at school, including harassment and assault.[182] Discrimination at school puts transgender students at risk of suicide, mental health issues, and worse educational outcomes, and Title IX's strong protections are needed to ameliorate these risks.[183]

The Proposed Rule is also consistent with governing case law. The Supreme Court's recent decision in *Bostock v. Clayton County*[184] held that, under Title VII, discrimination on the basis of sexual orientation or gender identity "requires an employer to intentionally treat individual employees differently because of their sex," which includes being discriminated against for ''traits or actions it would not have questioned in members of a different sex."[185] Because courts have

[178] 87 Fed. Reg. 41,410.

[179] Kosciw et al., *The 2019 National School Climate Survey: The experiences of lesbian, gay, bisexual, transgender, and queer youth in our nation's schools*, GLSEN 45, 48 (2020); *see also* Greytak et al., *Harsh Realities: The Experiences of Transgender Youth in Our Nation's Schools*, GLSEN 25, 27 (2009) (showing that more-frequently harassed transgender students had significantly lower grade point averages than other transgender students).

[180] Kosciw et al., *The 2019 National School Climate Survey*, at 49.

[181] *Id.* at 28 (81% of LGBTQI+ students reported being verbally harassed because of their sexual orientation, gender identity, or gender expression, and more than one in three (35.1%) reported they were verbally harassed often or frequently).

[182] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 132-35 (Nat'l Ctr. for Transgender Equal. Dec. 2016).

[183] James et al., *2015 U.S. Transgender Survey*, at 132; Kosciw et al., *The 2019 National School Climate Survey*, *supra*, at 45, 48; Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, J. of Pub. Mgmt. & Soc. Policy 65, 75 (2013).

[184] *Bostock v. Clayton County, Georgia,* 140 S. Ct. 1731 (2020).

[185] *Id.* at 1742, 1737.

long looked to Title VII to interpret Title IX's mandate,[186] it stands to reason that Title IX's protection against "discrimination on the basis of sex" therefore similarly protects against discrimination based on sexual orientation and gender identity. The Proposed Rule is likewise consistent with several federal circuit court decisions interpreting Title IX, and a U.S. Department of Justice memorandum determining, based in part on this case law, that the "best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation."[187]

The Proposed Rule's approach also aligns with the Department's longstanding practice and prior interpretations. In 1997, the Department's Office of Civil Rights (OCR) explained that "sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX."[188] Then, in 2001, OCR identified that sex discrimination included harassment based on sexual orientation, harassment based on the victim's failure to conform to stereotyped notions of femininity, and that sexual harassment can occur between members of the same sex.[189] In 2010, OCR reaffirmed that "Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[190] In 2014, OCR reiterated that Title IX's prohibition on discrimination includes discrimination based on gender identity.[191] In 2006 and 2020, OCR recognized protections against specific types of sex stereotypes.[192] Finally, in 2016, OCR explained that a student's gender identity must be treated as their sex for purposes of Title IX's prohibition on sex-based discrimination.[193]

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[186] *See, e.g.*, *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

[187] Memorandum, Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972, 2, U.S. Department of Justice Civil Rights Division (Mar. 26, 2021); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.* 858 F.3d 1034 (7th Cir. 2017) (holding that exclusion of transgender children from restrooms that match their gender identity is prohibited under Title IX); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) (same); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (observing that Bostock's interpretation guides the evaluation of Title IX claims), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878, 210 L. Ed. 2d 977 (2021).

[188] *See* 1997 Guidance at 12,039.

[189] *See* 2001 Policy, https://tinyurl.com/fp8v3y7x.

[190] Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Harassment and Bullying, 8 (Oct. 26, 2010), https://tinyurl.com/mrd4vjyc.

[191] 2014 Q&A.

[192] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62,539 (Oct. 25, 2006) (proposed § 106.34(b)(4)(i) (recipients must ensure that their single-sex classes are substantially related to the recipient's important objective and do not rely on overly broad generalizations about either sex.)); 34 CFR § 106.45(b)(1)(iii) (Decisionmakers must receive training on the relevance of questions and evidence, which includes "questions and evidence about the complainant's sexual predisposition or prior sexual behavior [that] are not relevant.").

[193] Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Off. for Civ. Rts., Dear Colleague Letter on Transgender Students, 2 (May 13, 2016, rescinded), https://tinyurl.com/ue38fd8h.

Relatedly, the Proposed Rule appropriately recognizes that sex discrimination need not occur based on binary gender identities. In this regard, the 2020 Amendments, which presupposed "sex as a binary classification,"[194] are out of step not only with Title IX and the Department's historical practice, but also the irrefutable reality that there are thousands of Americans whose anatomy is neither typically "male" nor typically "female."[195] Consistent with this, the Proposed Rule rightly prohibits discrimination on the basis of sex characteristics, including intersex traits,[196] and clarifies that the list of characteristics set forth in the preamble is not exhaustive.[197]

Finally, the Proposed Rule appropriately recognizes that, while not all distinctions based on sex are impermissible, the limited circumstances where such distinctions are allowed must not cause more than *de minimis* harm to a person.[198] Studies show that denying students' ability to participate in education-related activities that match the student's gender identity cause more than *de minimis* harm. One study found that almost 70% of transgender students avoided restrooms and other school spaces because they felt unsafe or uncomfortable.[199] Additionally, denying students the opportunity to participate in sports causes more than *de minimis* harm for a number of reasons, including because students that participate in sports are more likely to graduate from high school, go to college, and achieve higher grades and scores on standardized tests.[200] Participating in sports also increases students' self-confidence and connection with peers.[201] Therefore, the Proposed Rule appropriately clarifies that "adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity subjects a person to more than *de minimis* harm on the basis of sex."[202] This requirement is also consistent with court decisions finding that denying a student access to facilities or activities consistent with their gender identity is prohibited under Title IX.[203] To further delineate the protections already outlined in the Proposed Rule, the States look forward to release of a Title IX athletics rule that will make "amendments to § 106.41 . . . in the context of sex-separate athletics."[204] We encourage

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[194] 85 Fed. Reg. 30,178.

[195] Stephanie Dutchen, *The Body, The Self,* Harvard Medicine (2022), https://tinyurl.com/24c2j92u ("Estimates of incidence range from more than 1 in 100 to less than 1 in 5,000 births, suggesting a prevalence between 66,000 and 3.3 million people in the United States.").

[196] 87 Fed. Reg. 41,532.

[197] *Id*.

[198] *Id*. at 41,534; *see Peltier* v. *Charter Day Sch., Inc.,* 37 F.4th 104, 129 (4th Cir. June 14, 2022) (en banc) (''for the plaintiffs to prevail under Title IX, they must show that . . . the challenged action caused them harm, which may include 'emotional and dignitary harm''' (internal citation omitted)).

[199] Kosciw et al., *2015 National School Climate Survey*, at 86.

[200] National Coalition for Women and Girls in Education, *Title IX at 45: Advancing Opportunity through Equity in Education* 41 (2017), https://tinyurl.com/y2787rcy.

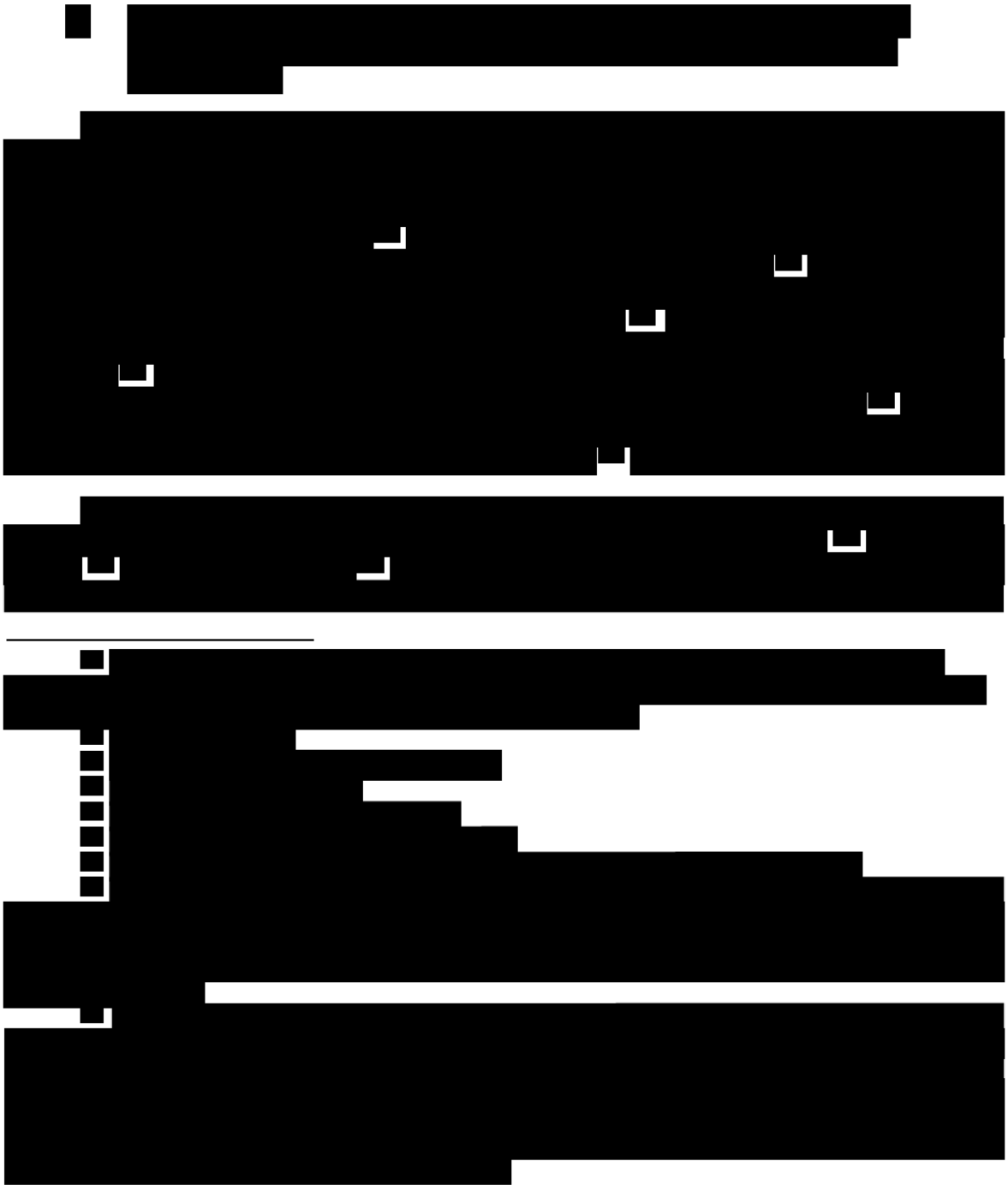
[201] *Id*. at 42; *see also* Stacy M. Warner et al., *Examining Sense of Community in Sport: Developing the Multidimensional 'SCS' Scale*, 27 J. of Sport Management 349, 349-50 (2013).

[202] 87 Fed. Reg. 41,534.

[203] *See, e.g., Grimm,* 972 F.3d at 617–18 (holding that evidence that a transgender boy suffered physical, emotional, and dignitary harms as a result of being denied access to a sex-separate program or activity consistent with his gender identity was sufficient to constitute harm under Title IX).

[204] 87 Fed. Reg. 41,538.

this forthcoming proposed rulemaking to further clarify that under Title IX, all students can participate fully and equally in school sports.



[redacted]

3. The Proposed Rule's changes to the grievance procedures for K-12 schools better effectuate the purpose of Title IX.

Students in grades K-12 are particularly vulnerable to sexual harassment.[132] Instances of sexual harassment are both underreported and on the rise in K-12 schools,[133] and the unique developmental needs of K-12 students require an expeditious and supportive complaint process.[134] Evidence shows how important it is to address misconduct in young children before it escalates in order to prevent long-term harm.[135] The Proposed Rule makes vital changes to the grievance procedures for K-12 schools, including: (1) applying grievance procedures to all complaints of sex-based discrimination; (2) requiring reasonably prompt resolution of all complaints; (3) allowing Title IX coordinators to determine whether a complaint should be initiated; (4) protecting student privacy; and (5) ensuring protections for students with disabilities. Each of these changes, individually and taken together, further Title IX's antidiscrimination mandate.

First, under the Proposed Rule, grievance procedures will apply to all complaints of sex discrimination, not just complaints of sexual harassment.[136] This is in direct contrast to the 2020 Amendments, which impose onerous procedures for complaints of sexual harassment only.[137] The States report that the 2020 Amendments created a dual-track investigative process (one track for sexual harassment complaints, another for all other sex discrimination complaints) that can take months to complete. For example, K-12 schools in Vermont have had to dismiss a sexual harassment complaint if it does not allege the level of sexual misconduct required to meet Title IX's current definition, and then refile the report and take action under a separate process under state law. Schools in Washington and California have had similar experiences, finding that the grievance procedures imposed by the 2020 Amendments make it challenging to process complaints of sexual misconduct. Illinois schools have similarly found that the split grievance systems create unnecessary complexity, especially because individuals understand their grievance in terms of conduct, not legal grounds. The Proposed Rule will avoid the pitfalls of the 2020

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[130] The 2020 Amendments acknowledge this and threaten schools for non-compliance. 85 Fed. Reg. 30,444 (recipients forego federal financial assistance if they will not renegotiate a collective bargaining agreement or are concerned about state law compliance).

[131] 87 Fed. Reg. 41,577 (proposed § 106.46(b)).

[132] Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), https://tinyurl.com/3pyvmuxh; Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), https://tinyurl.com/ywyp7az5 (noting differences in the types of sexual harassment and reactions to it).

[133] *E.g.*, CRDC 2020.

[134] *See Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[135] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); 85 Fed. Reg. 30,486 (discussing harms raised by commenters from significant delays).

[136] 87 Fed. Reg. 41,463 (clarifying that the same grievance procedure is used for sexual harassment claims and other claims of sex discrimination).

[137] 34 C.F.R. § 106.45(b) (grievance procedure provided only for sexual harassment).

Amendments by streamlining grievance procedures and applying a single set of procedures to all sex discrimination claims.

The Proposed Rule also allows school districts to simultaneously meet other requirements of state law that may, for example, allow for greater protection for students subjected to sexual harassment, thus better effectuating Title IX's purpose and ensuring the opportunity for the Title IX coordinator to address patterns of discrimination in the recipient's educational program or activity.

Second, the Proposed Rule returns the K-12 grievance procedures to a prompt and equitable process that recognizes the unique needs of young students. As discussed, *supra* at Section I.C.1, the Proposed Rule appropriately requires that a recipient establish reasonably prompt timeframes for the major stages of the grievance procedures but does not mandate specific minimum timeframes for each stage.[138] This change is, again, in contrast to the 2020 Amendments, which require schools to adhere to set timeframes, which led to more protracted investigations. For example, under the Amendments, after the formal complaint is filed, a school must engage in 10-step process spanning at least 20 days before it can impose even minor discipline, such as an after-school detention, community service, or training, or issue any remedies that may unreasonably burden a respondent.[139]

In the experience of the States, elementary and secondary school-age children are not best served by lengthy procedures, which are less effective at preventing recurring sex discrimination.[140] In Vermont, for example, the inability to use a single-investigator model has hampered schools' capacity to process complaints. The schools struggle to hire the necessary staff and resort to taking other administrative staff from their normal duties. Schools in the States also report spending exorbitant amounts of time and money on ensuring compliance with the 2020 Amendments. K-12 schools need flexibility to determine, after a constitutionally sufficient process, an appropriate response to prevent escalation of sexual harassment.[141] This is what the Proposed Rule allows for, in furtherance of Title IX's purpose.

The Proposed Rule also gives a recipient more flexibility in conducting an emergency removal of a respondent when the respondent poses a threat to the health and safety of others, as it now permits emergency removal of a respondent after a recipient conducts an individualized assessment and determines that an immediate threat exists, and removes the limitation that the threat must be "physical."[142] Taken together, these changes better effectuate Title IX's purpose and Congressional intent, balancing due process with the need to ensure that students are protected from sexual harassment and receive prompt and effective resolutions to their complaints.

Third, the Proposed Rule returns flexibility to the Title IX Coordinator to decide whether a complaint should be initiated and ensures that all complaints received orally or otherwise are

[138] 87 Fed. Reg. 41,468, 41,575 (proposed § 106.45(b)(4)).
[139] 85 Fed. Reg. 30,310; 30,288; 34 C.F.R. § 106.45(b)(2), (5)(iv)-(vii), (6)(i)-(ii), (7)(ii), (8).
[140] *See* 87 Fed. Reg. 41,459.
[141] *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 580, 582-83 (1975).
[142] 87 Fed. Reg. 41,451-52, 41,574 (proposed § 106.44(h)).

promptly and equitably addressed.[143] Conversely, the 2020 Amendments, which require a written formal complaint before a sex discrimination investigation can be initiated, created significant barriers for K-12 students because (1) young children and students with disabilities often do not have the capacity to complete a formal complaint and may instead report via informal oral communications with staff, and (2) some children do not have a parent or a guardian, and therefore do not have a representative to help them file a complaint.[144] Furthermore, Los Angeles Unified School District has reported that parents may be unavailable to file on their child's behalf for a variety of reasons, such as abuse, interaction with the foster system, literacy, difficulty writing in English, or disability.

While recognizing the importance of complainant autonomy, the Proposed Rule properly allows the Title IX Coordinator to weigh other factors—such as age—that are consistent with schools' legally recognized *in loco parentis* responsibilities.[145] Furthermore, the Proposed Rule ensures that *all* students have an adult advocating for them by providing authorized legal representatives with the right to act on behalf of an individual without a parent or guardian.[146] This change appropriately permits an educational representative, who may not be a youth's guardian but is legally authorized to act on the youth's behalf, to initiate Title IX proceedings.[147] By adding flexibility regarding the initiation of a Title IX complaint, the Proposed Rule furthers Title IX's antidiscrimination mandate.

Finally, the Proposed Rule also includes appropriate privacy protections to ensure that students who file a Title IX complaint do not experience retaliation from classmates, parents or school staff for voicing their concerns.[148] In contrast, the 2020 Amendments prohibit recipients from restricting the ability of either party to discuss the allegations, including the parties' names, under investigation.[149] Under the 2020 Amendments, the States have seen that without any limitations on students' ability to spread information about complaint allegations, complaining students have been subject to social retaliation—on and offline—which creates a chilling effect (and can subject the complainant to a further hostile campus environment). As discussed, *supra*, in Section I.C.1., the Proposed Rule properly returns the appropriate privacy protections to K-12 students by requiring that a "recipient must take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures," while explicitly balancing this goal with various practical necessities of the grievance process.[150] Schools would also be prohibited from disclosing private student information except when the student has

[143] *Id*. at 41,451.

[144] *Id*. at 41,404 (the 2020 rule only designates a parent or guardian to act on behalf of the student), *Id.* at 41,569 (proposed § 106.6(g)).

[145] *Id*. at 41,445; *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

[146] 87 Fed. Reg. 41,404.

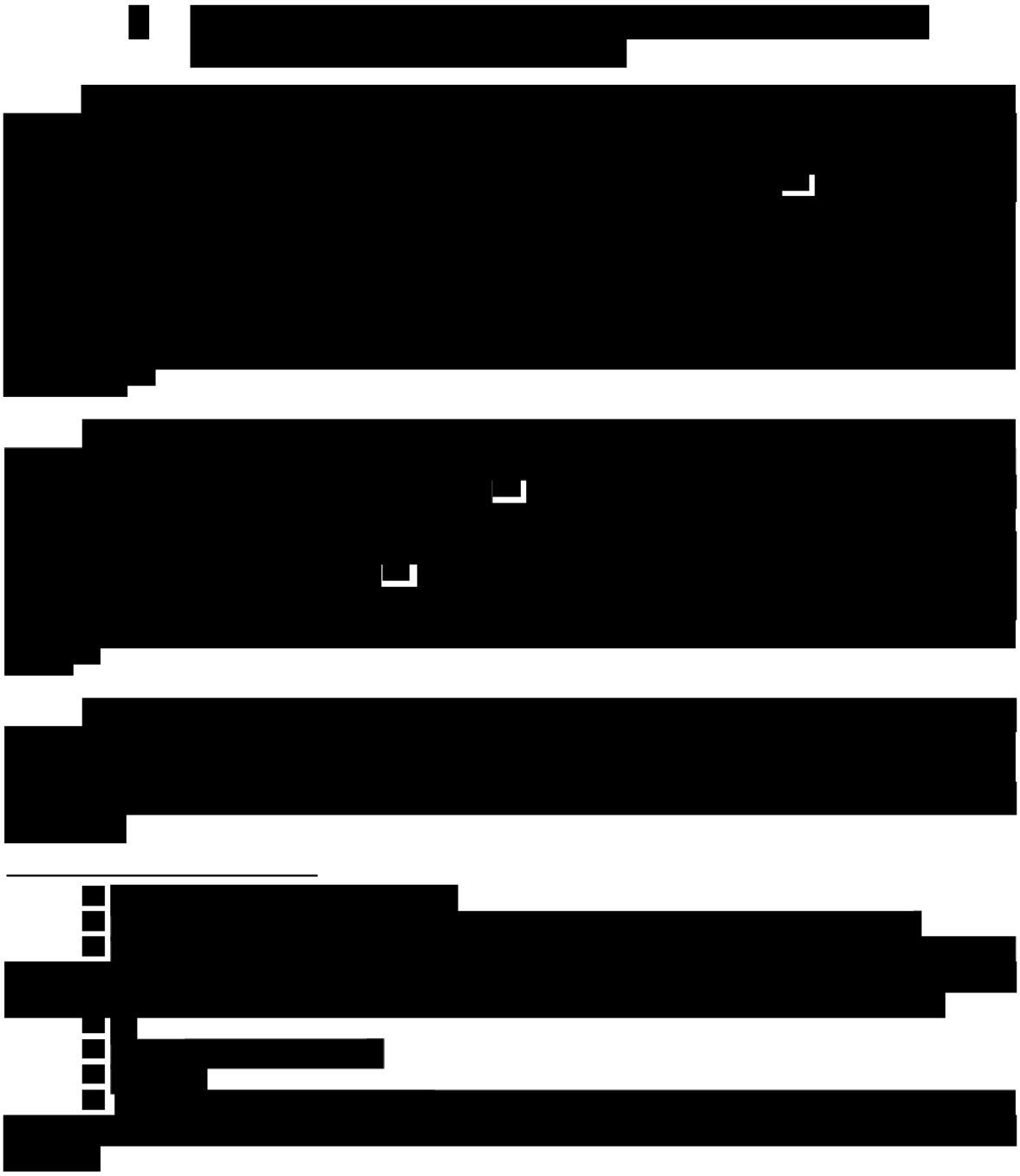
[147] *Id*; Lichty, L.F., Torres, J.M., Valenti, M.T. and Buchanan, N.T. (2008), Sexual Harassment Policies in K-12 Schools: Examining Accessibility to Students and Content. Journal of School Health, 78: 607-614. https://tinyurl.com/5n7dfb35.

[148] 85 Fed. Reg. 30,295 (acknowledging and chronicling concerns raised by many commenters); 87 Fed Reg. at 41,469.

[149] 87 Fed Reg. 41,469.

[150] *Id.* at 41,575 (proposed § 106.45(b)(5)).

consented to the disclosure, when permitted by FERPA, when required by other laws, or to carry out the purpose of Title IX.[151] These changes represent a return to the longstanding practice of protecting the privacy of young students during grievance proceedings.[152]



Applicant Details

First Name	**Julia**
Last Name	**Crain**
Citizenship Status	**U. S. Citizen**
Email Address	**juliacrain@uchicago.edu**
Address	**Address** Street **5454 S Shore Dr, Apt 522** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**3022870484**

Applicant Education

BA/BS From	**Barnard College**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 1, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Fahey, Bridget
bfahey@uchicago.edu
720-272-0844
Lakier, Genevieve
glakier@uchicago.edu
773-702-9494
Strauss, David
d-strauss@uchicago.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

5454 S. Shore Drive
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302-287-0484
juliacrain@uchicago.edu

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year student at The University of Chicago Law School applying for a clerkship in your chambers for the 2024-2025 term.

As a crisis counselor for the Trevor Project, the leading national suicide prevention hotline for LGBTQ youth, I consoled a gay teenager whose parents drove him across state lines for the pseudoscientific but legal conversion therapy they mandated; a transgender student whose school kicked her off the track team once she "came out" as transgender; a middle schooler whose teachers ignored her classmates' homophobic bullying. I came to law school to become a lawyer-advocate on their behalf. Clerking will arm me with the tools and perspective to litigate for LGBTQ rights.

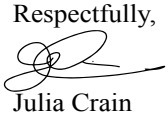
My writing and research skills will make for a strong addition to your chambers.

Writing was the focal point of my pre-law school employment. At Sotheby's, I drafted essays on the highest value paintings in our contemporary art auctions. At The Metropolitan Museum of Art, I proofread and edited exhibition catalogues. I maintain my connection to literature and the visual arts by editing *Pique*, a magazine I founded to celebrate queer women artists. Thus far, I have commissioned and published twenty-three short stories and essays.

My legal research experience cuts across a variety of substantive areas. In preparing for trial with the Abrams Environmental Law Clinic, I dove into the IL Rules of Evidence and parsed through complicated agency regulations. In drafting an Eleventh Circuit brief for a client of the Federal Defenders Program in Montgomery, AL, I analyzed Fourth Amendment jurisprudence. In assisting Professor Bridget Fahey, I navigated scholarship on constitutional theory. I will continue to develop my legal research skills this summer as a Summer Associate at Sullivan & Cromwell LLP and a legal intern at Lambda Legal.

My resume, writing sample, transcript, and letters of recommendation from Professors Lakier, Strauss, and Fahey are enclosed in my OSCAR application. If there is any other information that would be helpful to you, please do not hesitate to let me know. Thank you for your consideration.

Respectfully,



Julia Crain

Julia Crain
5454 S. Shore Drive, Chicago, IL 60615 | (302) 287-0484 | juliacrain@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, IL
J.D. Candidate, June 2024
- Activities: Research Assistant, Professor Bridget Fahey; OutLaw, President; Abrams Environmental Law Clinic, Student Attorney; Hinton Moot Court; Jewish Law Students Association, Member

Barnard College, Columbia University, New York, NY
B.A. in Art History with a Minor in History, May 2018
- Honors: Summa Cum Laude, Virginia B. Wright Prize in Art History
- Activities: *Columbia Daily Spectator*, Editorial Board; Columbia Mock Trial; *The Current*, Literary & Arts Editor

AWARDS & HONORS

Rhodes Scholarship and Marshall Scholarship, Washington, DC, *Finalist*, November 2017
- Nominated by Barnard College and selected as a finalist for both the Rhodes and Marshall Scholarships

EXPERIENCE

Sullivan & Cromwell LLP, New York, NY, *Summer Associate*, start date: June 2023

Lambda Legal Defense and Education Fund, Chicago, IL, *Legal Intern*, start date: August 2023

Middle District of Alabama Federal Defenders Program, Montgomery, AL, *Legal Intern*, June-August 2022
- Drafted a reply brief for the Eleventh Circuit and memoranda for attorneys on capital habeas issues

The Trevor Project, New York, NY, *Crisis Worker*, September 2020-May 2021
- Served as a counselor for the Trevor Lifeline, the leading national suicide prevention hotline for LGBTQ youth
- Volunteered 120 hours for the Trevor Lifeline between January 2019 and September 2020 (prior to employment)

Sotheby's, New York, NY, *Associate Cataloguer (Contemporary Art)* and *Trainee*, September 2018-April 2020
- Wrote essays on top lots, liaised with artist estates and galleries to research provenance and confirm authenticity, acquired copyright for images in sale catalogues, and coordinated restoration of art with conservators

The Metropolitan Museum of Art, New York, NY, *Publications Intern*, Summer 2017
- Edited and proofread exhibition catalogues and didactics
- Developed and led four themed tours of the museum for visitors after completing a training course with Met educators

The Smithsonian American Art Museum, Washington, DC, *Public Programs Intern*, Summer 2016
- Planned public programs ranging from academic symposia, artist gallery talks, to musical performances at the museum

Friedlander & Gorris, P.A., Wilmington, DE, *Summer Intern*, Summer 2015
- Provided discovery research for senior attorneys and edited a brief for the Delaware Supreme Court

SERVICE & ACTIVITIES

PIQUE, New York, NY, *Founding Editor*, January 2020-Present
- Founded *Pique*, an independent magazine that celebrates the art and cultural contributions of queer women
- Produced the print and digital issues by commissioning 23 short stories and essays, acquiring an ISSN through the Library of Congress, and overseeing a team of editors, graphic designers, computer scientists, and fine art printers

Nightline, New York, NY, *Peer Listener* and *Training Coordinator*, September 2015-May 2018
- Served as a staff member of Barnard and Columbia's anonymous peer listening hotline
- Taught 25 students in a semester-long course on active listening and mental health crisis intervention

Anti-Sexual Violence Advocacy, New York, NY, *Advocate*, September 2014-December 2015
- Worked with Governor Andrew Cuomo's staff on developing Enough Is Enough, legislation aimed at reducing college sexual assault, and lobbied legislators in Albany to pass the legislation; it passed in July 2015
- Guest lecturer at Katherine Franke's Columbia Law School course and Michele Dauber's traveling Stanford seminar

LANGUAGES & INTERESTS

Italian (intermediate proficiency) | Scuba Diving (holds dual certification) | Classical Ballet (19 years)

THE UNIVERSITY OF CHICAGO
Office of the University Registrar
Chicago, Illinois 60637

Name: Julia E Crain
Student ID: 12329078

Scott C. Campbell, University Registrar

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Program Status:Active in Program
J.D. in Law

External Education

Barnard College-Columbia University
New York, New York
Bachelor of Arts 2018

Beginning of Law School Record

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Richard Mcadams	3	3	176
LAWS	30211	Civil Procedure Diane Wood	4	4	177
LAWS	30611	Torts Saul Levmore	4	4	175
LAWS	30711	Legal Research and Writing Daniel Wilf-Townsend	1	1	178

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	173
LAWS	30411	Property Thomas Gallanis Jr	4	4	179
LAWS	30511	Contracts Bridget Fahey	4	4	177
LAWS	30711	Legal Research and Writing Daniel Wilf-Townsend	1	1	178

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Daniel Wilf-Townsend	2	2	181
LAWS	30713	Transactional Lawyering Joan Neal	3	3	176
LAWS	43227	Race and Criminal Justice Policy Sonja Starr	3	3	177
LAWS	44201	Legislation and Statutory Interpretation Ryan Doerfler	3	3	176
LAWS	47201	Criminal Procedure I: The Investigative Process John Rappaport	3	3	175

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence Geoffrey Stone	3	3	178
LAWS	42301	Business Organizations Anthony Casey	3	3	175
LAWS	45801	Copyright Randal Picker	3	3	177
LAWS	53263	Art Law William M Landes Anthony Hirschel	3	0	

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	177
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	179
LAWS	53365	LGBT Law Camilla Taylor	3	0	
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	2	0	

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	40501	Constitutional Law V: Freedom of Religion Mary Anne Case	3	0	
LAWS	43313	Fair Housing Lee Fennell	3	3	177
LAWS	53469	Advanced First Amendment Law Genevieve Lakier	3	0	
LAWS	53493	Topics in First Amendment Law and New Technologies Eugene Volokh	1	1	180
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	1	0	

Send To: Julia Crain
5454 S Shore Dr
Chicago, IL
60615-5919

End of University of Chicago Law School

Date Issued: 06/10/2023

Page 1 of 1

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://esl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

A PHOTOCOPY OF THIS DOCUMENT IS NOT OFFICIAL

Bridget Fahey
Assistant Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
bridget.fahey@uchicago.edu | 773-702-1184

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It's a great pleasure to write this letter of recommendation for my student and research assistant Julia Crain. I first met Julia in my 1L Contracts class and was so impressed with her that I hired her as a research assistant even before the quarter concluded. Her work for me was terrific and as I have gotten to know her better, I have only become more impressed by her: she has rich and fascinating intellectual interests and a wonderful, warm personality. I recommend her for a clerkship without reservation. She will be an excellent law clerk and can look forward to a distinctive and distinguished career.

Julia served as a research assistant for me and did terrific work. I'm at the beginning stages of a project on originalism, and I asked Julia to canvass the literature on originalism's representation problem—that is, that relying on the views of the Founders excludes the views of women and people of color, subjecting today's diverse national community to the decisions made by a narrower and less representative group of individuals. Julia did a wonderful job. She not only found, read, and summarized the relevant literature in a matter of days, she synthesized the work into three main substantive themes, in each case connecting papers written by a range of authors across the span of decades—in some cases forging connections between articles that the authors themselves hadn't made. I was very impressed. And it was all very Julia—thorough and disciplined, but clearly motivated by her understanding of the consequences of the question she'd been asked. It bodes very well for her work as a law clerk, and for her life in the law.

I invite all of my first-year students to coffee in small groups throughout the quarter. These out-of-the-classroom moments allow me to get to know students in a more informal setting and give them a chance to interact with a professor without the intense pressure of our classroom environment. Last winter, when I had Julia in class, our law school still had COVID protocols that required masking in all law school spaces, so my coffees with Julia's class were less lighthearted than I would have hoped. Ordinarily, this might inhibit the goal of drawing students out of their shells and placing them at ease. But I remember my coffee with Julia and her group well. Julia stood out to me immediately, even behind a mask. She is soft-spoken, but everything she says in interesting and deliberate. I asked students about their hobbies and interests and was delighted to learn that Julia trained as an elite ballerina for 19 years. When I asked what she took from ballet into her academic career, she didn't hesitate: discipline. Having been an elite athlete, Julia is a person who knows how to work hard, to work through discomfort, to stay at it even when others drop off. My own experiences with Julia since that first coffee—professional and extracurricular—bear out that.

I have had the pleasure of seeing how deeply motivated Julia is by issues of justice and equality. That's obvious from her resume, which show the texture of her engagement with the world, even as a law student. In between college and law school—while working as an art cataloguer at Sotheby's—she founded Pique, a magazine focused on the artistic and cultural contributions of queer women. (Julia and I have had many conversations about ballet—a shared passion—and how new choreographers have pushed their art form beyond expected gender roles.) And she's continued as the magazine's editor even as she's thrown herself into life at the law school. Julia is president of the Law School's OutLaw group, which is known for its terrific programming for all law students. She's done sustained work as a crisis counselor—first during her time at Barnard, where she manned a crisis hotline and then after her graduation, as a volunteer with the Trevor Project, an organization that provides a crisis hotline for LGBTQ youth. And she spent her first summer as a law student doing capital habeas work in Alabama—among the hardest and most important work she could think of to do. Julia is, in short, a person with deeply felt passions and motivations, and a commitment to incorporating them into her life—whether she gets credit for them or not.

Julia earned a median grade in my Contracts course. I joined the faculty at the University of Chicago almost three years ago and one of the things I have been most impressed by in my first few years here is the extraordinary quality of our median student's exam. Because our grading scale has so many gradations, our students work incredibly hard, and earning a median grade requires immense time and effort because all of our students are hustling for every last point in their grade. It is, as a result, excruciating to assign grades in 1L classes. In my experience, what distinguishes a median exam from an exam that earned a grade even a standard deviation above is often a small creative maneuver or a particularly elegant point, not missed issues or inferior analysis. Our median student, in my experience, does not miss issues—and having reviewed Julia's exam, she is no exception. I am convinced that our 1Ls work the hardest of any in the country: In addition to subjecting them to three exam periods throughout the year because of our quarter system, we place them on a highly motivating curve. As a result, I can be confident that the median student in my Contracts class knows the subject in and out and worked hard for that knowledge. I have no doubts—at all—about Julia's ability to perform at the highest level as a law clerk.

As you can tell, I admire Julia very much, and I urge you to interview and hire her. I am sure you won't regret it. Please don't

hesitate to reach out to discuss Julia if I can be of any further assistance at all. She's a remarkable student and I'm excited to see where her legal career takes her.

Sincerely,
Bridget Fahey

Genevieve Lakier
Professor of Law

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June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship recommendation for Julia Crain

Dear Judge Walker:

It is with great enthusiasm that I write to recommend Julia Crain for a clerkship in your chambers. Julia is extraordinary: very smart, sincere, hard-working, and committed to using her legal skills for good. I highly recommend her.

Julia's path to law school was a winding one. A lover of art, when she got to Barnard College as an undergraduate, Julia decided to major in art history. She did very well in the program, winning the Virginia B. Wright Prize for a promising future art historian. While at Barnard, however, Julia also got involved in advocacy on behalf of victims of sexual violence. She ultimately worked with university administrators to identify weaknesses in the university's Title IX policies and provided feedback to then-Governor Cuomo on proposed legislation to combat sexual violence. Julia found herself to be both very good at, and very interested in, the theoretical and practical challenges of legal reform and committed to the egalitarian ends they promoted. This explains why, despite obtaining a coveted job in the art world as a cataloguer at Sotheby's Auction House in New York, Julia decided after a few years to enter law school and put her prodigious academic and personal skills to the ends of public interest law.

The decision was a good one. Julia is a born lawyer. She is quick on her feet, excellent at identifying both the strengths and the weaknesses in legal arguments, and good at articulating herself succinctly and well. She is also thoughtful, sincere, and clearly driven by a strong commitment to equality and justice. I have had the pleasure of teaching Julia on in two of my classes this year at the University of Chicago Law School—First Amendment law (Constitutional Law II) and a seminar on Advanced Issues in First Amendment law—and Julia added a lot to the class discussion both times. Julia has a gentle demeanor, as well as a sharp mind; the combination makes her unusually able to productively engage with those who disagree with her. And she clearly loves First Amendment law (Of course, how could she not?). She was consequently an energetic, positive, but also incisive and at times provocative contributor to class discussion in both classes, but particularly in the more discussion-based seminar—someone I was really grateful to have in the room. These qualities lead me to think she would also be a terrific person to have in chambers.

Julia would bring other skills to the job as well. She is hardworking and an excellent multi-tasker. While at the law school, Julia has not only performed well in the classroom; she has also taken on a number of serious extracurricular responsibilities. In particular, she has proven herself to be one of the most energetic and effective presidents of OutLaw in the law school's recent history. In her capacity as president, she has brought a terrific roster of speakers to campus, to speak about how contemporary legal controversies impact the LGBTQ community, and pushed the student group to be a more active presence at the law school than it had previously been. She has also maintained her interest in contemporary art by continuing to publish the magazine, Pique, that she founded a few years ago to celebrate the art and culture of queer women. As these examples illustrate, Julia is productive, organized and very hard-working. Perhaps because of her background in, and continuing interest in, art Julia also brings to legal discussion a wide-ranging humanistic sensibility that can be illuminating. Julia was, for example, a very fun person to talk to about the First Amendment law of symbolic expression. More generally, she brings a range of perspectives and knowledge to doctrinal and normative debate.

Julia is also (if it wasn't already clear) a lovely person. She is forthright but gentle in her disposition, deeply sincere, and thoughtful. And she cares passionately about what she does. She is, in short, someone who is going to contribute a great deal to the world in the course of her legal career and someone who I have absolutely no doubt will make a terrific clerk. For all these reasons, I highly recommend Julia for a clerkship in your chambers. If I can do anything to aid you in your decision, or if you have any questions, please do not hesitate to email (glakier@uchicago.edu) or call (773 702-1223).

Sincerely,

Genevieve Lakier
Professor of Law and Herbert & Marjorie Fried Teaching Scholar

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June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Julia Crain, who has just finished her second year here, is an excellent student and a terrific person. She took my class in Constitutional Law, and I often talked with her outside of class about the material, and about other subjects as well. Julia was the president of OutLaw, the student organization dedicated to supporting LGBTQ rights; I spoke at an OutLaw event, so I worked with Julia in that capacity as well. Her intelligence and thoughtfulness impressed me every time. She is a friendly, outgoing person who seems to be well-liked by everyone. I think she would be a first-rate law clerk, in every respect.

Julia was a standout in class discussions in the Constitutional Law class. Her contributions were consistently smart and thoughtful. She never over-simplified issues, and she showed a very sophisticated understanding of how the law develops. I remember one instance in particular: Julia, in an oral contribution in class, essentially rewrote an important Supreme Court decision to place it on more solid ground.

The decision was Katzenbach v. McClung, which of course upheld the public accommodations provisions of the Civil Rights Act of 1964 against a claim that they exceeded Congress's power under the Commerce Clause. The claim was brought by the proprietor of a diner that catered to few interstate travelers but served food that had moved in interstate commerce. The opinion of the Court justified the statute on the ground that racial discrimination by the diner diminished the amount of food that moved in interstate commerce.

Julia argued, in class, that a different justification for decision would have been at least as sound and less artificial. The decision could have been better justified, she said, by relying on the line of Commerce Clause cases that established Congress's power to forbid the shipment in interstate commerce of objects that produced what Congress considered to be an evil in the destination state. (The cases in that line upheld, among other things, statutes forbidding the interstate shipment of lottery tickets, adulterated food, and goods manufactured in substandard labor conditions.) That approach, she said, would have focused the justification not on the fact that less food is consumed in establishments that discriminate but on something closer to the real concern: that interstate commerce was being used to facilitate racial discrimination. It was a sophisticated argument, and, I think, it was entirely right. I was not surprised when Julia made such a smart point; that was characteristic of her.

I reread Julia's exam in that class in order to prepare this letter. The exam was very solid, but I think it understated Julia's ability. She missed a couple of points that she could have made, and that meant that her grade was good rather than great. But the exam was the work of a very smart person. (I did not know at the time that it was Julia's exam; our exams are blind-graded.) I write notes about each of the exams while I am grading them, and one of the notes I wrote about Julia's exam was that, while it did not cover all the ground it should have covered, it was unusually intelligent: it was the work of someone who not only had an excellent understanding of the material but was able to go beyond the basics.

Julia is committed to advancing the rights of LGBTQ individuals and, as the saying has it, she walks the walk. In addition to her position in OutLaw, she spent time, as an undergraduate, as a crisis worker answering telephone calls on a suicide prevention hotline. I am sure she will carry that commitment into her career, and I am sure she will do outstanding work. I think she will be a great person to have in chambers. I recommend her very enthusiastically.

Sincerely,

David A. Strauss
Gerald Ratner Distinguished Service Professor of Law

WRITING SAMPLE

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I drafted the enclosed brief for my LGBT Law course during my second year at The University of Chicago Law School. I was tasked with writing an amicus brief on the First Amendment issues found in a fictional fact pattern. The hypothetical case was filed in the Western District of Tennessee.

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STATEMENT OF ISSUES

1. Springfield High School punished Jacob for bullying another student who did not conform to sex stereotypes. The question presented is whether Jacob had a First Amendment right to verbally target and demean his classmate.
2. Students at Springfield harassed an openly gay student until he killed himself. Bullies continue to harass LGBT Springfield students. So Springfield sought to protect its vulnerable students. The question presented is whether Springfield violated the First Amendment by implementing a policy that prohibits bullying based on sexual orientation and gender identity.
3. Billie, a gender-nonconforming student, strives to resist sex stereotypes. He decided to express his femininity by wearing the ultimate symbol of teenage girlhood: a prom dress. But that was too daring for Springfield's taste. The question presented is whether Springfield violated his First Amendment right to express unconventional views.

STATEMENT OF FACTS

Homophobia haunts Springfield High School. It infests Springfield's halls. It torments its targets. And to grave consequence: after relentless anti-gay bullying, a sixteen-year-old Springfield student took his own life.

Not much has changed in the two years since the student's passing. But today, the school's bigots target Billie. Billie, a gender-nonconforming junior, was assigned male at birth and continues to use male pronouns. He expresses his nonconforming gender identity, with the support of his therapist and parents, by way of his dress. He dons feminine attire. He grows his hair long. He wears makeup. He carries a purse.

For Billie, Springfield High is a minefield. He is constantly dodging slurs; students regularly refer to him as a "faggot" and a "queer." His appearance is the frequent target of students' anti-LGBT vitriol.

Springfield Principal Diane Curtis knew she had to do something. So she instituted a new anti-bullying policy that "prohibit[s] bullying and discrimination based on race, ethnicity, religion, sex, sexual orientation, and gender identity."

But the bullying continued. It reached an apex in the leadup to Springfield's prom. After word got out that Billie planned to wear a dress to prom, Jacob, a student ringleader, began launching an attack. He rallied support among his lacrosse teammates. "It is ridiculous," he told them, that "a dude is going to wear a dress at prom." His plan? Mock Billie by clownishly wearing a dress to prom. He brought his buddies to the mall. He bought a garish wig. And he selected a racy dress.

To announce his plan, Jacob took a photo of the dress and posted it on Instagram. "Sexiest prom ever," he captioned the post, and tagged Billie. His bait was clear.

Back at school, students lamented how "the whole controversy [was] going to turn the prom into 'a joke' and ruin it for everyone."

Principal Curtis tried, again, to reign in the bullying. She punished Jacob for his post with a one-hour detention. If he kept the attacks on Billie going, she warned, he would neither attend prom nor play lacrosse for the rest of the season.

But in trying to settle the chaos, Principal Curtis went too far. She told Billie that he may, in no circumstance, wear a dress to prom. In so doing, she violated the First Amendment.

SUMMARY OF ARGUMENT

Competing interests drive the tension in primary and secondary school speech jurisprudence. On the one hand, as "nurseries of democracy," *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021), schools must empower young people to develop their own points of view. "On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials…to prescribe and control conduct in the schools." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). Because school officials must "protect those entrusted to their care," *Morse v. Frederick*, 551 U.S. 393, 395 (2007), and because "no school could operate effectively if teachers and administrators lacked the authority to regulate in-school speech," *Mahanoy*, 141 S. Ct. at 2050, schools may impose regulations on student speech that go beyond ordinary First Amendment limits. *See e.g.*, *Barr v. Lafon*, 538 F.3d 554, 567–68 (6th Cir. 2008) ("First Amendment standards applicable to student speech in public schools…are unique, and courts accord more weight in the school setting to the educational authority of the school in attending to all students' psychological and developmental needs").

Springfield High School struggled to balance these interests. When it punished Jacob for mocking Billie, it correctly distinguished "bullying and harassment targeting particular individuals," *Mahanoy*, 141 S. Ct. at 2045, from "general statement[s] of discontent." *Doe v. Hopkinton Pub. Sch.*, 19 F.4th 493, 506 (1st Cir. 2021). It assumed responsibility for providing a learning environment free from harassment. It recognized its duty to protect the young people entrusted to its care. But when it prohibited Billie from expressing his gender identity, it caved to the "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

ARGUMENT

I. The School Did Not Violate Jacob's Free Speech Rights.

A. Because of its responsibility to educate and protect students, Springfield has wide latitude to regulate its school environment.

"The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). Fourth Amendment precedent illustrates the disparities. On the one hand, adults get strong protection from the Court's "reasonable expectation of privacy" test. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). They can expect to speak freely, without government eavesdropping, in enclosed public telephone booths. *Id*. They can expect to place their luggage into an overhead compartment, without the police squeezing it to determine its contents, on a Greyhound bus. *See Bond v. United States*, 529 U.S. 334, 338–39 (2000). On the other hand, students generally cannot expect privacy in schools. And so the Fourth Amendment affords them little protection. Schools may search students' purses when they smoke cigarettes on school grounds. *See New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). Schools may subject student athletes to drug tests without reasonable suspicion. *See Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995).

Students' rights are especially different from those of adults when it comes to free speech. For example, the "special characteristics of the school environment," *Tinker*, 393 U.S. at 506, require schools to ban speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id*. at 513. Outside of schools, the bar for banning speech is much higher. States may not even "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action

and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Furthermore, the Court welcomes disorder in the public sphere. *See, e.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (the First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger"); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("[S]o long as the means are peaceful, the communication need not meet standards of acceptability").

The same is not true in schools. They have more leeway to regulate speech when it comes to crude language. Because of "society's…interest in teaching students the boundaries of socially appropriate behavior," *Fraser*, 478 U.S. 675, 681, schools may ban "lewd, indecent, or offensive speech." *Id*. at 683. This narrowing of constitutional rights in schools makes sense. "As a practical matter, it is impossible to see how a school could function if administrators and teachers could not regulate on-premises student speech, including by imposing content-based restrictions in the classroom. In a math class, for example, the teacher can insist that students talk about math, not some other subject." *Mahanoy*, 141 S. Ct. at 2050 (Alito, J., concurring). In addition, "the school's authority and responsibility to act *in loco parentis* also includes the role of *protecting other students* from being maltreated by their classmates." *Chen Through Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 722 (9th Cir. 2022) (emphasis in original). Furthermore, "the preservation of order and a proper educational environment requires close supervision of children." *T.L.O.*, 469 U.S. at 339.

B. In punishing Jacob for his Instagram post, Springfield did not overstep its authority.

To assess the validity of a school's regulation of student speech, the court must first determine what kind of regulation is at hand. The Supreme Court has, thus far, addressed four

kinds of student speech regulations: (1) bans on lewd speech, *Fraser*, 478 U.S. at 683; (2) regulations of speech "bear[ing] the imprimatur of the school," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988); (3) bans on "speech that can reasonably be regarded as encouraging illegal drug use," *Morse*, 551 U.S. 393, 397; and (4) regulations of "disruptive" speech. *Tinker*, 393 U.S. at 516 n.1. Jacob's post neither advocated for illegal drug use nor bore the imprimatur of the school. While the caption teased that this year's prom would be the "sexiest ever," he was not disciplined for the post's lewdness. Rather, Principal Curtis took issue with it because of its disruptive effects. As such, the *Tinker* standard applies.

The question is whether "the school authorities had reason to anticipate that" Jacob's post "would substantially interfere with the work of the school or impinge upon the rights of other students." *Id*. at 509. An "undifferentiated fear or apprehension of disturbance" would not have been a sufficient basis on which they could act. *Id*. at 508. But that was not the case here. Jacob's post targeted and demeaned another student. Because the school's history of rampant homophobia signaled a need to curb anti-LGBTQ bullying, Springfield was well within its constitutional limits when it instituted its anti-bullying policy.

Some speech, including that which targets and degrades a specific student, is per se disruptive to the school environment. *See, e.g.*, *Kutchinski v. Freeland Cmty. Sch. Dist. No 22-1748*, 2023 WL 3773665, at *4 (6th Cir. June 2, 2023) (explaining that "schools must be able to prohibit threatening and harassing speech") (internal citation omitted); *Chen Through Chen v. Albany Unified Sch. Dist.*, 56 F.4th 708, 717 (9th Cir. 2022) (explaining that "students do not have a First Amendment right to 'target' specific classmates in an elementary or high school setting"); *Mahanoy*, 141 S. Ct. at 2045 (explaining that schools may regulate "serious or severe bullying or harassment targeting particular individuals"). For example, in *Doe v. Hopkinton Pub. Sch.*, eight

students on the school hockey team exchanged demeaning Snapchat messages about their teammate; they ridiculed his appearance, mocked his voice, and insulted his family. 19 F.4th 493, 497 (1st Cir. 2021). Vehement in its rejection of the students' First Amendment claim, the court emphasized, "speech that actively encourages such direct or face-to-face bullying conduct is not constitutionally protected." *Id*. at 508.

Courts have been reluctant to permit schools to sanction students when they express offensive views if they couch the views in broad terms. For example, in *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, a school penalized a student for wearing a shirt that read "Be Happy, Not Gay," to express his moral opposition to homosexuality. 523 F.3d 668, 670 (7th Cir. 2008). But because he named no particular student, the court found that the school had overstepped. *See id.* at 676. After all, "There is a significant difference between expressing one's religiously-based disapproval of homosexuality and targeting LGBT students for harassment." *Id.* at 679. (Rovner, J., concurring). The Tenth Circuit reached the same conclusion vis-à-vis general, offensive student speech versus specific, targeted student speech. *See C1.G on behalf of C.G. v. Siegfried*, 38 F.4th 1270, 1279 (10th Cir. 2022). In that case, a school had punished a student for captioning a Snapchat photograph of himself and his friends in World War II-type garb, "Me and the boys bout [sic] to exterminate the Jews." *Id*. at 1274. The court found that the lack of "speech directed toward the school or its students" was dispositive, and the school had infringed on his free speech rights. *See id* at 1279.

Disruption to the school environment can manifest in a variety of ways. An "increase in absenteeism," *Barr*, 538 F.3d at 560, a bout of "upset, yelling, or crying" students, *Chen Through Chen*, 56 F.4th at 713, "a decline in students' test scores, [and] an upsurge in truancy," *Nuxoll*, 523 F.3d at 674, may indicate that disruption has, in fact, occurred.

Jacob's post disrupted the school environment. Rather than espousing general views on gender expression or gender identity, he singled Billie out. He identified Billie as the subject of his mockery by "tagging" him in the post. Even without the explicit identification, his target would have been obvious to his classmates; he shared a photograph of a dress with a snide caption about prom—after having publicly made fun of Billie for his decision to wear a dress to prom. Jacob's post was part and parcel of his larger scheme to bully Billie.

What about the fact that Jacob made his post after school hours and while he was off campus? No matter. "The school's regulatory interests remain significant in some off-campus circumstances." *Mahanoy*, 141 S. Ct. at 2045. For example, the Supreme Court in *Mahanoy* explicitly named off-campus "bullying" and "harassment" as within the school's jurisdiction to regulate. *Id*. That case was about a high school student who, during her free time and while she was off campus, posted critical messages about the school's cheerleading program on Snapchat. *Id*. at 2043. Unlike Jacob, the respondent in *Mahanoy* "did not identify the school in her posts or target any member of the school community with vulgar or abusive language." *Id*. at 2047.

The Court identified "three features of off-campus speech that often…distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech." *Id*. at 2046. First, the idea that schools stand in for parents to "protect, guide, and discipline" the students under their care, carries less force when the students are at home with their parents. *Id*. Second, "regulations of off-campus speech, when coupled with regulations of on-campus speech," impose a 24/7 ban on the given form of student speech. *Id*. Third, schools must strive to protect "unpopular ideas," as "public schools are the nurseries of democracy." *Id*. These factors pointed in favor of protecting the student speech in *Mahanoy*.

The Ninth Circuit assessed the *Mahanoy* factors in a recent off-campus student speech case and landed on the side of the school. *See Chen Through Chen*, 56 F.4th at 711. The student there created an Instagram account and "used the account to make a number of cruelly insulting posts" about specific classmates. *Id*. The posts were, according to the court, categorically different from speech that expresses an unpopular viewpoint. *Id*. at 722. "Students…remain free to express offensive and other unpopular viewpoints, but that does not include a license to disseminate severely harassing invective targeted at particular classmates in a manner that is readily and foreseeably transmissible to those students." *Id*. at 722-23. The latter is unworthy of protection, regardless of time of day. *Id*. at 721. Furthermore, the court acknowledged that schools retain a duty to protect students from bullying, even when it takes place off campus. *Id*. at 722. "Indeed, a *failure* by the school to respond to (the student's) harassment might have exposed it to potential liability." *Id*. (emphasis in original).

Likewise here, the school retained an interest in punishing Jacob for his speech, even though it took place off-campus. First, it was foreseeable that his harmful post would reach the school. The post itself indicates that Jacob wanted that to happen. By tagging Billie, Jacob ensured Billie would see it. In addition, other students were clearly his intended audience. Only they would know enough context—that Billie is gender nonconforming, and that he wished to wear a dress to prom—to catch the cruel joke. He wanted to instigate his classmates, and that is exactly what happened. Second, his targeted bullying was different in kind from the *Mahanoy* student's broad statement of dissatisfaction. Where the respondent in *Mahanoy* expressed frustration with a school program, Jacob taunted another student because of his identity. When the Court worried about school restrictions effectively controlling "all the speech a student utters during the full 24-hour day," *this* is not the kind of speech with which it was concerned. *Mahanoy*, 141 S. Ct. 2038, 2046.

Jacob's speech here was disruptive to the school, even though it took place off campus, and the school was within its authority to punish him.

C. Springfield's anti-bullying policy is not overbroad.

Jacob will likely argue that the policy is overbroad, as it may cover general expressions of anti-LGBT antipathy.

"A law is overbroad under the First Amendment if it 'reaches a substantial number of impermissible applications' relative to the law's legitimate sweep." *Schickel v. Dilger*, 925 F.3d 858, 880 (6th Cir. 2019) (citation omitted). Courts are generally reluctant to strike down laws on overbreadth grounds. *See, e.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1581 (2020) (noting that "invalidation for First Amendment overbreadth is 'strong medicine' that is not to be 'casually employed'") (citation omitted). That is especially true with regard to regulations of speech in primary and secondary schools. *See, e.g., McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 244 (3d Cir. 2010) (explaining that "the overbreadth doctrine warrants a more hesitant application in" primary and secondary schools "than in other contexts"). In addition, courts must strive to cure the overbreadth before striking a policy in its entirety. *See, e.g. Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) (noting that "a policy can be struck down only if no reasonable limiting construction is available that would render the policy constitutional"). Furthermore, "[I]t is important to recognize that the school district may permissibly regulate a broader range of speech than could be regulated for the general public, giving school regulations a larger plainly legitimate sweep." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 935 (3d Cir. 2011). Ultimately, the question is whether a school's policy "cover[s] substantially more speech than could be prohibited under *Tinker's* substantial disruption test." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

In primary and secondary schools, context may render otherwise permissible speech "disruptive." Take, for example, dress code bans on clothing with the Confederate flag. Sometimes, such bans are unconstitutional. *See e.g., Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001) (holding that the constitutionality of a Confederate flag ban depends, in part, on whether the school had a history of race-based violence). Other times, they are not. For example, in *Barr v. Lafon*, "racial tension" plagued the high school. 538 F.3d 554, 566 (6th Cir. 2008). Students marred its walls with racist graffiti. *Id*. at 567. "Hit lists" with Black students' names cropped up around campus. *Id*. Racially-motivated violence erupted in the halls. *Id*. at 557. There, unlike elsewhere, the school officials "reasonably forecast that permitting students to wear clothing depicting the Confederate flag would cause disruptions to the school environment." *Id*. at 566.

Disruption may justify policies more expansive than bans on specific symbols. The racial hostility at the school in *Sypniewski*, 307 F.3d 243, illustrates the point. There, a white student had shown up to school in Black face; he "wore a thick rope around his neck tied in a noose." *Id*. at 247. Several white students formed "gang-like" groups and celebrated "White Power Wednesdays." *Id*. They physically threatened other white students who associated with their Black peers. *Id*. The school responded by instituting the following policy:

> District employees and student(s) "shall not racially harass or intimidate other student(s) or employee(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. *Id*. at 249.

Except for the phrase "ill will," the policy, said the Third Circuit, was not overbroad. *Id*. at 265. "'Racial harassment or intimidation by name calling' is more likely disruptive in the Warren Hills schools than elsewhere." *Id*. at 264.

The pervasive homophobia at Springfield justifies the school's proscription of "bullying and discrimination based on…sex, sexual orientation, and gender identity." Anti-gay bullying drove a gay Springfield student to suicide just two years ago. Students today refer to Billie with homophobic slurs. They endlessly tease him for his appearance, as it does not conform with sex stereotypes. While in other contexts, general expressions of anti-gay antipathy may be protected speech, here, virulent anti-LGBT hostility "provides a substantial basis for legitimately fearing disruption." *Sypniewski*, 307 F.3d 243, 262. As such, the policy legitimately regulates "bullying and discrimination based on…sex, sexual orientation, and gender identity" because of such speech's disruptive effects. With regard to those characteristics, the policy is not overbroad.

The policy's language calls to mind Title VII's proscription of workplace discrimination against an employee "because of such individual's race, color, religion, sex, or national origin." 78 Stat. 255, 42 U. S. C. §2000e–2(a)(1). Title VII does not bar all harassment, only harassment that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citations omitted). Similarly, Title VI plaintiffs must show "'severe or pervasive' harassment" to establish a hostile environment claim. *L. L. v. Evesham Twp. Bd. of Educ.*, 710 F. App'x 545, 549 (3d Cir. 2017) (internal citations omitted). Title IX is no different. *See, e.g., Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631 (1999) (holding that a Title IX plaintiff "must show harassment that is so severe, pervasive, and objectively offensive,

and that so undermines and detracts from the victims' educational experience, that the victims are effectively denied equal access to an institution's resources and opportunities").

The same is true of Springfield's anti-bullying policy. It proscribes "bullying and discrimination based on race, ethnicity, [and] religion" when such bullying and discrimination rises to the level of creating a hostile environment. In drafting the policy, Springfield's administrators acted in recognition of a "longstanding interpretive principle: When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (internal citations omitted). Such a construction renders the policy fully compliant with the *Tinker* standard. Surely speech that creates a hostile school environment also substantially disrupts the school.

D. Springfield's anti-bullying policy does not amount to impermissible viewpoint discrimination.

Jacob may also argue that Springfield's policy is unconstitutional because it proscribes only *some* forms of bullying. In *R.A.V. v. City of St. Paul, Minn.*, the Supreme Court invalidated an ordinance that regulated the display of symbols "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. 377, 380 (1992). The statute, as construed by the Minnesota Supreme Court, applied to "fighting words," and thus "reached only expression 'that the First Amendment does not protect.'" *Id*. at 381. Nonetheless, the making of content-based distinctions within a low-value category posed a constitutional problem. *Id.* at 383-84. The Court explained:

> [Low-value] areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be

> made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel critical of the government. *Id*.

A law may only make such content-based distinctions "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id*. at 388.

Springfield acted within *R.A.V*'s limits when it banned "bullying and discrimination based on race, ethnicity, religion, sex, sexual orientation, and gender identity." Bullying on the basis of "some immutable or at least tenacious characteristic," *Baskin v. Bogan*, 766 F.3d 648, 655 (7th Cir. 2014), is the most invidious form of bullying. Such characteristics "bear [ ] no relation to ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). And minorities within each of the listed categories have historically "been subjected to discrimination." *Lyng v. Castillo*, 477 U.S. 635, 638 (1986). As such, discriminatory bullying is proscribable because the harm it inflicts is "the very reason the entire class of speech at issue is proscribable." *R.A.V*, 505 U.S. at 388.

In the alternative, the *R.A.V.* limit does not apply in the primary and secondary school context. Primary and secondary school speech precedent veers most sharply from general First Amendment rules when it comes to viewpoint discrimination. Whereas, "[i]n the ordinary case it is all but dispositive to conclude that a law is content based and, in practice, viewpoint discriminatory," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011), that is not so in schools. As the Sixth Circuit noted, "the Court in *Tinker* did not hold that a viewpoint-discriminatory rule in the schools would necessarily be unconstitutional; such a rule would still be constitutional if it met the disruption standard outlined in the opinion." *Barr*, 538 F.3d at 570.

II. The School Violated Billie's Free Speech Rights.

A. By denying him the opportunity to wear a dress to prom, the school silenced Billie's symbolic speech.

"The First Amendment literally forbids the abridgment only of 'speech,' but" the Court has "long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). A broad array of expressive conduct—from flag burning, *id.* at 399, to go-go dancing, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565 (1991)—can implicate the First Amendment. Expressive conduct, in fact, lies at the heart of the Supreme Court's school speech jurisprudence; the students in *Tinker* expressed their opposition to the Vietnam War by wearing black armbands. 393 U.S. 503, 504.

Outside of the primary and secondary school context, the constitutionality of a regulation of expressive conduct depends on whether the regulation is "*directed at* the communicative nature of conduct," *Johnson*, 491 U.S. at 406 (emphasis in original), or is "unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The former triggers strict scrutiny. *See Johnson*, 491 U.S. at 412. The latter triggers intermediate scrutiny. *O'Brien*, 391 U.S. at 377. Specifically, courts ask "whether the legislature enacted [the] challenged law (1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an 'incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest.'" *84 Video/Newsstand, Inc. v. Sartini*, 455 F. App'x 541, 548 (6th Cir. 2011) (cleaned up).

In the primary and secondary school context, courts assess the constitutionality of regulations of expressive conduct with the same tests they use to assess restrictions of pure speech. *See, e.g., Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1162 (9th Cir. 2022). In the present case,

Principal Curtis restricted the wearing of prom dresses to cisgender girls for two plausible reasons: (1) she sought to silence Billie's expression of gender nonconformity, or (2) she sought to curb lewdness at Springfield. Neither justification, in the present circumstance, passes constitutional muster. Principal Curtis lacked a substantial basis for fearing disruption would ensue at the school as a result of Billie wearing a prom dress. *Tinker*, 393 U.S. at 513. It also would have been unreasonable for her to have regarded his wearing a dress as lewd. *See B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 298 (3d Cir. 2013).

The first step in the analysis is to determine whether the conduct being suppressed is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974). Courts ask whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404. By wearing a dress to prom, Billie would have met both prongs.

Dress code departures may be sufficiently expressive to implicate the First Amendment—but only if those departures are born from a desire to express more than individual style. The plaintiff in *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005), was unable to meet this threshold. Like many girls in the sixth grade, the plaintiff Amanda wanted "to be able to wear clothes that 'look [ ] nice on [her].'" *Id*. at 385-86. Her school's dress code stood in the way of her doing so. *Id*. But "the First Amendment does not protect such vague and attenuated notions of expression—namely, self-expression through any and all clothing that a 12–year old may wish to wear on a given day." *Id*. at 390. The student in *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152 (9th Cir. 2022), on the other hand, did sufficiently demonstrate an intent to convey a particularized message through her dress code departure. Her school did not permit students to decorate their graduation

caps and gowns. *Id*. at 1157. Yet the student, "an enrolled member of the Sisseton Wahpeton Oyate, a Native American tribe," wanted to adorn her cap with an eagle feather—an important symbol in her culture. *Id*. at 1155-56. The symbol takes on special significance in the school context, the court noted, due to the history of Native American school childrens' forced assimilation. *Id*. "[B]y wearing an eagle feather at graduation, [she] sought to convey a particular message of academic achievement and resilience." *Id*. at 1161.

A message must also be "readily underst[andable] by those viewing it." *Zalewska v. Cnty. of Sullivan, New York*, 316 F.3d 314, 320 (2d Cir. 2003). When a female bus driver for the Department of Transportation asked to wear a skirt (because of her views on modesty), in violation of the Department's pants-only policy, the Second Circuit wrote, "[I]t is difficult to see how Zalewska's broad message would be readily understood by those viewing her since no particularized communication can be divined simply from a woman wearing a skirt." *Id*. at 317-20. Similarly, when a high school teacher refused to wear a necktie, in violation of his school's faculty dress code, the court said his message of disaffection—as communicated through his lack of necktie—was too "vague and unfocused." *E. Hartford Ed. Ass'n v. Bd. of Ed. of Town of E. Hartford*, 562 F.2d 838, 857-58 (2d Cir. 1977). Nonetheless, clothing *may* effectively communicate information about its wearer. *See, e.g., Zalewska*, 316 F.3d 314, 319 (offering "the nun's habit" and "the judge's robes" as examples). The *Zalewska* court contrasted the female bus driver's inapparent message with an on-point example:

> [T]here may exist contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection. A state court in Massachusetts, for example, found…that a male high school student's decision to wear traditionally female clothes to school as an expression of female gender identity was protected speech…This

> message was readily understood by others in his high school context, because it was such a break from the norm. It sent a clear and particular message about the plaintiff's gender identity. *Id*. at 320.

The legibility of the student's nonconforming gender expression was dispositive.

To express his nonconforming gender identity, Billie could have chosen no symbol more legible than a prom dress. Few garments capture an era's ideal of American femininity with such clarity. After all, prom occupies a singular place in the American teenage experience. Embedded into the popular imagination are prom scenes from classic coming-of-age movies: the iconic "hand jive" in *Grease*; the arrival of neck brace-clad Regina George in *Mean Girls*; the vicious prank in *Carrie*. And prom carries with it a slew of rigid, gendered customs. Boutonnieres for boys. Corsages for girls. Rented tuxedos for boys. Gowns for girls. By participating in the rite of prom, dressed in a gown, Billie's intent to celebrate his gender nonconformity would have been unmistakable.

Like the armbands in *Tinker*, Billie's dress expresses a political view. *See Tinker*, 393 U.S. 503, 516 n.1. The Sixth Circuit recently described nonconforming gender identity as a subject of "passionate political and social debate," *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021). Because "gender identity" is "a hotly contested matter of public concern," *Id*. at 506, Billie's expression is protected by the First Amendment.

B. The school violated the Constitution in silencing Billie's symbolic speech.

Springfield may not ban Billie's dress under *Tinker*. By wearing a dress, he would not have disrupted the school environment. When word got out about his plan, students did not protest. They did not turn away from their studies. They did not band together to cause a ruckus. Instead, they simply discussed the matter. To be sure, some were disappointed. They thought his wearing

of a dress was controversial. But that's not enough to silence him under *Tinker*. *See, e.g., Mahanoy*, 141 S. Ct. at 2047-48 (holding that the discussion of the respondent's speech in an Algebra class was insufficiently disruptive to warrant discipline). Jacob's response (creating his vicious Instagram post) was an outlier reaction. The record shows that only he exhibited an outsized reaction to Billie's plan. Jacob's choice to bully Billie is not, without more evidence of disruption, sufficient reason to silence Billie.

Nor may Springfield ban Billie's dress under *Fraser*. *Fraser* permits schools to regulate "lewd, indecent, or offensive speech," 478 U.S. 675, 683. But what about speech that may, to some, be distasteful, but that does not amount to lewd or indecent speech? The Third Circuit addressed the question in relation to a dispute over middle school students wearing breast cancer awareness bracelets that read, "I ♥ boobies! (KEEP A BREAST)." *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 297–98 (3d Cir. 2013). The bracelets, the court said, fell outside of *Fraser*'s scope. *Id*. at 298. "[S]peech that does not rise to the level of plainly lewd and that could plausibly be interpreted as commenting on political or social issues may not be categorically restricted." *Id*. Likewise here, the speech at issue is not plainly lewd. By wearing a prom dress, Billie would be wearing an outfit no different than those of the girls at prom. There is no evidence that his dress would have been particularly revealing. Even so, there is no evidence that Springfield had implemented a policy requiring a level of modesty in dress. Therefore, any attempt to ban Billie's dress on grounds of modesty rings hollow. *C.f., Mahanoy*, 141 S. Ct. at 2047. ("[T]he school has presented no evidence of any general effort to prevent students from using vulgarity outside the classroom"). In addition, Billie's dress, like the breast cancer awareness bracelets, would serve as social commentary. Springfield may not invoke *Fraser* with impunity.

CONCLUSION

For the foregoing reasons, the court should dismiss Jacob's free speech claims and affirm Billie's right to express his nonconforming gender identity at the Springfield prom.

Applicant Details

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Date of BA/BS	**May 2014**
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Date of JD/LLB	**February 1, 2022**
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Moot Court Experience	**No**

Bar Admission

Admission(s)	**District of Columbia, Maryland**

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Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Michael J. Crowley
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March 27, 2023

The Honorable Jamar K. Walker
600 Granby Street
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Dear Judge Walker,

I am writing to apply for a 2024-2025 clerkship with your chambers. In February 2022, I graduated a semester early from Georgetown University Law Center (GULC). During law school, I attended courses in the evenings while working full-time for the U.S. Government and serving as an officer in the U.S. Army Reserves. Upon graduating from GULC, I joined White & Case LLP as an associate in the Washington, D.C. office. I would welcome the opportunity to learn from your experience not only as a judge, but also as a former prosecutor.

I believe my professional and academic experiences will make a strong addition to your chambers. My resume, transcripts, and writing samples are attached with this application. Additionally, my letters of recommendation from Eric Johnson (Deputy Chief; Department of Justice, National Security Division), Michael Raab (Professor; GULC), and Mary DeRosa (Professor; GULC) are included. I would welcome the opportunity to interview with you, and I look forward to hearing from you soon.

Respectfully,
Michael Crowley

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EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER **Washington, DC**
Juris Doctor, Evening Division **Feb. 2022**
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Journal: Editor for the *Journal of National Security Law & Policy*, elected Managing Editor (Fall 2020-Spring 2021)
Activities: Georgetown Constitution Center Legal Scholar; Summer Associate White & Case LLP (Summer 2021); Legal intern at the Department of Justice, National Security Division (Summer-Fall 2019); Member of Georgetown Law's Federalist Society Student Chapter

NATIONAL INTELLIGENCE UNIVERSITY **Bethesda, MD**
Master of Science in Strategic Intelligence **May 2018**
Coursework: Completed courses containing classified national security and intelligence subject matter

SYRACUSE UNIVERSITY **Syracuse, NY**
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Honors: Recipient of Army Reserves Officer Training Corps (ROTC) scholarship; Dean's List; National Society of Collegiate Scholars; and Syracuse delegate to Israel's Lauder School of Government, Diplomacy, and Strategy

LEGAL EXPERIENCE

WHITE & CASE LLP **Washington, DC**
Associate **March 2022 – Present**

- Counsels clients on national security related legal matters and complex transnational litigation matters
- Nominated as a Rising Star for The Legal 500's attorney rankings
- Represents clients, including Global Fortune 500 companies, before the Committee on Foreign Investment in the United States (CFIUS)
- Advises clients on sensitive national security investigations and compliance matters arising from laws and regulations administered by the U.S. Department of Treasury's Office of Foreign Assets Control (OFAC), the U.S. Department of Commerce's Bureau of Industry and Security (BIS), the U.S. State Department's Directorate of Defense Trade Controls (DDTC), and the Federal Communications Commission (FCC)
- Pro bono work includes providing support to the Institute for Justice in litigating constitutional rights

Summer Associate **May 2021 – Aug. 2021**

- Provided legal analysis to clients regarding Foreign Direct Investment laws
- Advised on due diligence reviews for complex mergers and acquisitions
- Drafted legal memoranda analyzing novel legal questions arising from ongoing criminal and civil litigation

U.S. DEPARTMENT OF DEFENSE **Washington, DC**
Mitigation Advisor for Foreign Investment Review Section **Jan. 2020 – May 2021**

- Provided legal analysis and guidance in DoD's Foreign Investment Review (FIR) team supporting CFIUS
- Reviewed complex mergers and acquisitions and identified the national security risks arising from the transactions
- Negotiated the imposition of mitigation measures aimed at addressing national security risks
- Provided recommendations to Secretary-level committee members and the POTUS

Chief of Staff for FIR Team Telecom Cell, Foreign Investment Review Section **June 2020 – May 2021**

- Promoted to Chief of Staff for the FIR Team Telecom Cell, while continuing to serve as CFIUS Mitigation Advisor
- Led the office's participation on Team Telecom, an interagency committee that reviews telecommunications licenses referred by the FCC
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    - Reviewed applications and provided recommendations to DoD leadership, the Committee, and the FCC

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POLICY CONSULTING EXPERIENCE

DELOITTE CONSULTING, LLP **Washington, DC**
Policy Consultant **March 2018 – May 2019**

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- Led Intelligence Community (IC) client's policy adjudication process and ensured that federal regulations were accurately interpreted and derivatively applied throughout the agency

ACCENTURE FEDERAL SERVICES **Washington, DC**
Senior Policy Analyst **Jan. 2017 – Dec. 2017**

- Evaluated regulatory and statutory policies and recommended compliance improvements for client in the IC
- Interpreted security law and monitored and researched relevant legislation pending before the United States Congress

THE BUFFALO GROUP **Washington, DC**
All-Source Intelligence Analyst for the Defense Intelligence Agency **June 2015 – Jan. 2017**

- Analyzed and published intelligence reports for DIA's Afghanistan/Pakistan Task Force, CJCS-J5 (Pentagon) and DIA's Middle East Africa Regional Center, Yemen Branch (DIAHQ)

UNITED STATES ARMY RESERVES EXPERIENCE

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Intelligence Officer (CPT) **Oct. 2018 – Sept. 2022**

- Provide targeting and geospatial analysis to the Army Geospatial Intelligence Battalion, National Geospatial-Intelligence Agency
- Graduate of Advanced GEOINT Production Course

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Executive Officer (1LT) **Aug. 2016 – Oct. 2018**

- Led over fifty soldiers in NISG's headquarters company and supported detachments within the State Department, DIA, NGA, and NSA
- Served as acting company commander despite lacking required time-in-grade

USAR 151ST THEATER INFORMATION OPERATIONS GROUP **Ft. Totten, NY**
Information Operations Planner (2LT – 1LT) **May 2014 – Aug. 2016**

- Completed extensive information operations training, which is the use and employment of information related capabilities to disrupt, corrupt, or usurp the decision making of adversaries
- Provided intelligence and IO support to 151 TIOG Field Support Teams forward deployed to AFRICOM

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School Total: 19.00

Entering Program:
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Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	004	05	Constitutional Law I: The Federal System Nicholas Rosenkranz	3.00	B+	9.99	
LAWJ	121	07	Corporations Charles Davidow	4.00	P	0.00	
LAWJ	128	08	Criminal Procedure Brent Newton	2.00	B	6.00	
LAWJ	1491	10	Externship I Seminar (J.D. Externship Program) Arun Rao		NG		
LAWJ	1491	92	~Seminar Arun Rao	1.00	A	4.00	
LAWJ	1491	94	~Fieldwork 3cr Arun Rao	3.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	13.00	6.00	19.99	3.33
Cumulative	32.00	6.00	19.99	3.33

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	007	97	Property John Byrne	4.00	P	0.00	
LAWJ	3093	09	Foreign Investment & National Security: The Committee on Foreign Investment in the United States Janine Slade	2.00	P	0.00	
LAWJ	455	07	Federal White Collar Crime Mark MacDougall	3.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	9.00	0.00	0.00	0.00
Annual	22.00	6.00	19.99	3.33
Cumulative	41.00	6.00	19.99	3.33

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2020							
LAWJ	317	06	Negotiations Seminar Cathy Costantino	3.00	P	0.00	
LAWJ	360	16	Legal Research Skills for Practice Rachel Jorgensen	1.00	P	0.00	
LAWJ	361	06	Professional Responsibility Stuart Teicher	2.00	P	0.00	

----------Continued on Next Column----------

	EHrs	QHrs	QPts	GPA
Current	6.00	0.00	0.00	0.00
Cumulative	47.00	6.00	19.99	3.33

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	025	07	Administrative Law Glen Nager	3.00	B+	9.99	
LAWJ	1402	05	National Security Regulation Allison Bender	2.00	A	8.00	
LAWJ	396	10	Securities Regulation Barry Summer	2.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	7.00	5.00	17.99	3.60
Cumulative	54.00	11.00	37.98	3.45

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	219	07	Emerging Growth Companies and Venture Capital Financings Derek Colla	2.00	B+	6.66	
LAWJ	524	07	Supervised Research Mary DeRosa	2.00	A	8.00	
LAWJ	876	11	International Business Transactions Don De Amicis	3.00	P	0.00	
LAWJ	962	09	U.S. Export Controls and Economic Sanctions Barbara Linney	2.00	B+	6.66	

	EHrs	QHrs	QPts	GPA
Current	9.00	6.00	21.32	3.55
Annual	22.00	11.00	39.31	3.57
Cumulative	63.00	17.00	59.30	3.49

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Summer 2021							
LAWJ	1524	06	Statutory Interpretation Joseph Laplante	3.00	A-	11.01	
LAWJ	940	09	Securities Law and the Internet Donna Norman	2.00	A	8.00	

	EHrs	QHrs	QPts	GPA
Current	5.00	5.00	19.01	3.80
Cumulative	68.00	22.00	78.31	3.56

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	1127	08	Cyber and National Security: Current Issues Seminar Mary DeRosa	2.00	A-	7.34	
LAWJ	165	09	Evidence Mushtaq Gunja	4.00	B	12.00	
LAWJ	178	07	Federal Courts and the Federal System Michael Raab	3.00	P	0.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	B+	13.32	
LAWJ	421	09	Federal Income Taxation Dorothy Brown	4.00	B	12.00	

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Michael J. Crowley
GUID: 820218403

---------- **Transcript Totals** ----------

	EHrs	QHrs	QPts	GPA
Current	17.00	14.00	44.66	3.19
Annual	22.00	19.00	63.67	3.35
Cumulative	85.00	36.00	122.97	3.42

---------- **End of Juris Doctor Record** ----------

CROWLEY MICHAEL J 4819050 08/02

06/29/19 1 OF 1

FALL 2018

LAW-504	CONTRACTS	04.00	A	16.00
LAW-516	RESEARCH & WRITING I	02.00	A-	07.40
LAW-522	TORTS	04.00	A-	14.80

LAW SEM SUM: 10.00HRS ATT 10.00HRS ERND 38.20QP 3.82GPA

SPRING 2019

LAW-501	CIVIL PROCEDURE	04.00	A-	14.80
LAW-507	CRIMINAL LAW	03.00	B-	08.10
LAW-517	RESEARCH & WRITING II	02.00	B+	06.60

LAW SEM SUM: 9.00HRS ATT 9.00HRS ERND 29.50QP 3.27GPA

FALL 2019

LAW-503	CONSTITUTIONAL LAW	04.00	--	--.--
LAW-508	CRIMINAL PROCEDURE I	03.00	--	--.--
LAW-654A	GOVERNMENT CONTRACTS FORMATION			
	GOVERNMENT CONTRACTS:FORMATION	02.00	--	--.--

LAW CUM SUM: 19.00HRS ATT 19.00HRS ERND 67.70QP 3.56GPA

END OF TRANSCRIPT

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

March 27, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I understand Michael Crowley has applied for a clerkship in your chambers. Michael is a skilled, mature student with a strong work ethic. I have been very impressed with him and recommend him highly.

As you know, Michael was a student in Georgetown's evening program. The evening students are an impressive group; most of them work full time while carrying a course load that is only slightly lighter than our full-time students. While in law school, Michael was an officer in the U.S. Army Reserves and worked full time as a civilian at the Department of Defense. He also participated in a number of extracurricular activities during law school, including working as a managing editor of Georgetown's Journal of National Security Law & Policy and as a student law scholar at the Center for the Constitution. Despite all of these obligations, he was a conscientious and successful law student. Michael graduated from law school with a strong record and has gone on to be an associate at a reputable law firm.

I first met Michael in the fall of 2020, when he asked me to supervise him on an independent study research project. In his paper, Michael analyzed whether there were due process limitations on the U.S. government's ability to identify and punish companies as part of an effort to secure the supply chain. The final paper was substantively excellent, well-written, and well-organized. He received an A for the independent study.

Michael was also a student in my "Cyber and National Security" seminar in the fall of 2021. The course explores the challenges of applying domestic and international law to cyber problems. It covers many thorny issues related to malicious hacking, particularly by foreign actors. For example, we looked at criminal prosecution of cybercrimes under the Computer Fraud and Abuse Act; how cybersecurity measures can implicate Fourth Amendment and privacy concerns; and a variety of legal issues related to private sector efforts to address cyber threats. Michael's final paper looked at the legal and practical issues that private sector companies face in preparing for and responding to data breaches and ransomware attacks. The paper provided clear and practical analysis and recommendations. It was ambitious and well written. Michael received an A- in the class.

Michael's is a talented writer with a strong work ethic. I believe he would be an excellent judicial clerk. Please let me know if I can provide any additional information.

Sincerely,

Mary B. DeRosa
Professor from Practice
Georgetown Law
mbd58@georgetown.edu
202-841-2415

March 27, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Michael Crowley for a clerkship. As one of Mike's supervising attorneys at the Department of Justice, I can speak with confidence about Mike's legal research and writing skills, and his professional demeanor.

Our office leads the Department of Justice's work in protecting national security from risks arising from foreign investments and transactions, telecommunications, technological supply chains, and related aspects of data security, cybersecurity and economic security. We regularly advise senior leadership on a range of legal and policy issues often at the intersection of emerging technology, foreign investment and national security, and work closely with the National Security Council and other interagency partners to address these issues. Attorney caseloads are significant, and cases are complex. Interns are expected to analyze and brief on sophisticated points of law, develop factual records and – in some cases – provide input on policy decision points.

Mike performed beyond expectations during his internship with our office. As a supervisor, and as a former federal district court clerk, I appreciate how critical legal research and writing skills are to a successful clerkship and the practice of law. Mike demonstrated exceptional research and writing skills during his tenure, quickly adapting to the unique legal and policy issues addressed by our office. Although Mike worked on a range of projects during his internship – including one of the first enforcement actions under the Foreign Investment Risk Review Modernization Act – he worked closely with me on a memorandum analyzing proposed language for a draft executive order addressing risks related to the United States' telecommunication networks. Mike's well-researched memorandum provided me with a solid foundation for assessing the law and tailoring an appropriate response to senior leadership and other policymakers. I believe this example illustrates the strong research and writing skills that Mike would bring to your Chambers.

As a legal intern, Mike also sought feedback for each substantive assignment. Unlike many interns – and particularly those with less professional experience – he quickly appreciated that the demands of legal writing in practice can differ from those in law school, and adapted accordingly. This willingness to review critically and objectively his work will serve Mike well in the close working relationships required in a federal clerkship.

Without question, Mike will be a fine addition to Chambers and your staff. He is a driven young man, who possesses a solid work ethic, and a positive attitude. He has set high goals for himself, and I fully expect him to meet – if not exceed – those goals. I give Mike my unequivocal recommendation, and trust that he will approach the demanding work of a federal clerk with the same commitment he brought to our office.

If desired, I would be happy to comment further by phone or email. I can be reached at 202.514.9476 or eric.s.johnson@usdoj.gov.

Sincerely,

/s/ Eric S. Johnson .
Eric S. Johnson
Principal Deputy Chief
National Security Division, Foreign Investment Review Section

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

March 27, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write in strong support of the application of Michael Crowley for a judicial clerkship.

Mike was a student in my Federal Courts class in the Fall 2021 semester. He was a pleasure to have in the class, and he made positive contributions to our discussion of the complex material that we covered—which included issues of justiciability, sovereign immunity, federal-question jurisdiction, habeas corpus, and the law governing suits under 42 U.S.C. § 1983. Mike's deep interest in the subject matter of the course was evident not only from his class participation but also from his close attention outside of class to matters of relevance to the course that arose during the semester.

Mike is very likeable and will be a welcome presence in chambers, and his considerable employment and academic experience should make him an excellent law clerk. Mike's ability to handle a full course load while also managing the responsibilities of a demanding full-time position at the Department of Defense as well as the rigors of Army Reserve membership is a testament to his extraordinary discipline and commitment to public service. And he has a strong interest in clerking, both because of his interest in public service and his goal of pursuing a career as a litigator.

Please feel free to contact me (202-514-4053) if you would like any additional information.

Sincerely,

/s/ Michael S. Raab

Michael S. Raab

Michael Raab - raabm@georgetown.edu

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

ZACHARY LEWIN, Plaintiff, v. DEVIN CONROY, Defendant.	Civil Action No. 123-019

PLAINTIFF'S MEMORANDUM OPPOSING
DEFENDANT DEVIN CONROY'S MOTION TO DISMISS [Notional Case]

Michael Crowley
Counsel for Plaintiff

INTRODUCTION

Zachary Lewin, a student at St. Catherine University, suffers seizures and other serious health complications after Defendant Devin Conroy furnished unlimited and easily accessible alcohol to Zachary despite being visibly intoxicated. Compl. ¶¶ 4, 15. Defendant unilaterally planned and hosted a party at a family friend's house which Zachary attended. Id. ¶ 3, 6. Defendant purchased mixing ingredients and provided unimpeded and unlimited access to a bar stocked with alcohol. Id. ¶¶ 4, 6. During the party, Defendant allowed Zachary, a stumbling and rowdy stranger, to leave the group of guests alone and access Defendant's alcohol. Id. ¶ 9. Nearly an hour later, a guest called 911 after discovering Zachary unconscious and helpless in the bathroom. Id. ¶¶ 11, 12. Zachary's blood alcohol level measured double Indiana's .08% definition of legal intoxication forty minutes after being discovered. Id. ¶ 12.

Defendant has moved to dismiss this case pursuant to Federal Rule of Civil Procedure 12(b)(6), asserting that the Indiana Dram Shop statute grants him immunity. The Indiana legislature included in that statute a specific exception that withholds immunity when furnishers of alcohol have actual knowledge the individual is visibly intoxicated at the time the alcoholic beverage is furnished; and their intoxication proximately causes injury. Ind. Code § 7.1-5-10-15.5 (1996).

A 12(b)(6) motion to dismiss can be granted only when a complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). This Complaint states a claim that is more than plausible. It alleges Defendant had actual knowledge Zachary was visibly intoxicated when he drunkenly stumbled and rowdily shouted after having unlimited, unsupervised, and unimpeded access to liquor; and registered a .16% blood alcohol level. Accordingly, the Motion to Dismiss should be denied.

STATEMENT OF FACTS

On the weekend of September 15-16, 2018, Defendant Devin Conroy stayed in the home of Archibald Mattis, a family friend and liquor distributor who entrusted Defendant to safeguard his house while out of town. Compl. ¶ 3. Rather than monitor the house responsibly, Defendant planned, prepared, and hosted a party on September 16 attended by over a dozen people, including Zachary Lewin. Id. ¶ 4. In preparing for the party, Defendant purchased tonic, limes, sour mix, and Diet Coke—mixing ingredients used to craft palatable cocktails allowing for increased consumption. Id. Defendant placed these additives atop Mattis' ten-foot-long bar fully stocked with liquor and other alcohols, encouraging guests to serve themselves. Id. ¶ 5.

Zachary, invited by another guest, arrived to the party shortly after noon and was greeted by Defendant whom he did not know previously. Id. ¶ 6. Defendant encouraged Zachary, a stranger, to make himself at home and join the other guests who were helping themselves to Defendant's open bar. Id. Zachary complied. Id. After nearly an hour of drinking cocktails, the guests refreshed their drinks and followed Defendant to the theater room to watch a football game. Id. ¶ 7. At the start of the second quarter, Zachary stood up to use the restroom but stumbled over another guest. Id. ¶ 9. After falling, Zachary pulled himself to standing, requiring the use of the wall to steady his shaky balance. Id. He then exited the room alone and rowdily shouted "Huzzah!" Id. Zachary served himself at least one additional drink in the living room but cannot confirm its strength nor ingredients because of his extreme intoxication. Id. ¶ 10.

At the start of half-time, nearly an hour after Zachary left the theater alone, guest Naomi Zucco discovered 5'9", 132-pound Zachary unconscious and helpless in the bathroom and immediately called 911. Id. ¶¶ 11, 12. Upon his admission to the hospital forty minutes later, Zachary's blood alcohol content (BAC) measured .16%; double the .08% definition of legal

intoxication in Indiana. Id. ¶ 12. Zachary's injuries resulting from his intoxication and subsequent fall included a major concussion, subdural hematoma, and seizure disorder; all of which precluded him from continuing his actuarial science studies for St. Catherine University's 2018-2019 school year. Id. ¶ 15.

STANDARD OF REVIEW

In resolving a Rule 12(b)(6) motion to dismiss, a court must accept the well-pled allegations of fact as true and construe them in favor of the plaintiff. Holloway v. Meyer, 311 Ill. App. 726 N.E.2d 678, 682 (2000). A complaint can be dismissed under Rule 12(b)(6) "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint." Id. (citing Jones v. Gen. Elec. Co., 87 F.3d 209, 211 (7th Cir. 1996)).

ARGUMENT

> The Complaint states a claim upon which relief can be granted, and the Indiana Dram Shop statute does not shield Defendant from liability because Defendant had actual knowledge that Zachary was visibly intoxicated when Defendant furnished Zachary alcohol.

Indiana's Dram Shop statute does not shield Defendant from liability for Zachary's injuries. Under Indiana statutory law, furnishers of alcohol may be liable for injuries that are proximately caused by an individual's intoxication when the furnisher has actual knowledge the individual is intoxicated at the time the alcohol is furnished. Ind. Code § 7.1-5-10-15.5 (1996). The Indiana legislature did not intend for this provision to provide blanket immunity for furnishers of alcohol; rather, the legislature included a specific exception to the Dram Shop statute intended to emphasize that alcohol furnishers may be held liable for intoxicated-related injuries. Zachary's Complaint establishes Defendant had actual knowledge of Zachary's visible intoxication based on his access to unlimited alcohol, drunken physical and verbal behavior, and

blood alcohol level. As a result, Zachary's Complaint surpasses the plausibility threshold, and the Indiana Dram Shop statute does not shield the Defendant from liability.

The facts set forth in the Complaint establish that Defendant had actual knowledge of Zachary's visible intoxication; Defendant does not dispute that he furnished Zachary alcohol nor that Zachary's injuries were proximately caused by his intoxication. Defendant had actual knowledge that Zachary was intoxicated when Zachary stumbled over a guest and rowdily shouted alone in the nearby room. Compl. ¶ 9. This drunken behavior occurred after Defendant provided Zachary free rein to his bar stocked with liquor and mixing ingredients. Id. ¶ 6. Moreover, Zachary's blood alcohol level measured .16% calculated up to one hour and forty minutes after Zachary's last known drink. Id. ¶¶ 10-12. Because Defendant had actual knowledge of Zachary's visible intoxication, the Defendant's Motion to Dismiss should be denied.

A. Defendant had actual knowledge that Zachary was visibly intoxicated because Zachary exhibited physical and verbal signs of drunkenness after unlimited access to alcohol and his blood alcohol levels indicated extreme intoxication.

Defendant's allegation of immunity is insufficient to overcome the lenient plausibility standard. Defendant had actual knowledge that Zachary was visibly intoxicated based on the kind and quantity of alcohol Defendant provided, Zachary's drunken physical and verbal behavior, and Zachary's extremely high blood aclohol levels. For nearly an hour, Zachary drank unlimited cocktails in the prescense of Defendant, who granted Zachary free rein to use his open bar despite being a stranger. Zachary exhibited signs of visible intoxication when he stumbled over a guest and rowdily shouted alone in the next room. Despite this concerning behavior, Defendant continued to allow Zachary unsupervised, uninterrupted, and unlimited access to his alcohol. Zachary was so intoxicated and helpless that he cannot remember the contents of his

next drink alone. Furthermore, Zachary's BAC measured .16%, double the legal definition of intoxiction, indicating that Defendant had inferential knowledge of Zachary's intoxication.

Actual knowledge is judged by circumstantial evidence including the kind and quantity of alcohol the individual is known to have consumed and the individual's behavior. See Meyer v. Beta Tau House Corp., 31 N.E.3d 501, 514 (Ind. Ct. App. 2015); Booker, Inc. v. Morrill, 639 N.E.2d 358, 362 (Ind. Ct. App. 1994); Ashlock v. Norris, 475 N.E.2d 1167, 1170 (Ind. Ct. App. 1985); Delta Tau Delta v. Johnson, 712 N.E.2d 968, 974 (Ind. 1999).

The kind and quantity of alcohol an individual consumes affects whether the furnisher has actual knowledge of the individual's intoxication. Meyer, 31 N.E.3d at 514; Ashlock, 475 N.E.2d at 1170. In Ashlock, the defendant found his intoxicated friend with a half-consumed cocktail before her. 475 N.E.2d at 1170. Over the next two hours, she finished the cocktail, drank another, and consumed three shots of liquor in the defendant's presence. Id. The court found that the defendant, who was no ordinary "disinterested bystander. . . ." *may* have known his friend was intoxicated based on the kind and quantity of alcohol she consumed, despite his claim that she did not appear intoxicated initially. Id. at 1171. In contrast, in Meyer, the court found no evidence of actual knowledge when a fraternity brother only drank two cocktails over the course of the entire night. Meyer, 31 N.E.3d at 514. Additionally, there was no evidence that the fraternity brother's behavior suggested intoxication. Id.

An individual's behavior at the time alcohol is furnished and condition after leaving the furnisher's presence also inform actual knowledge of visible intoxication. See Ashlock, 475 N.E.2d at 1170; Morrill, 639 N.E.2d at 362; Delta Tau Delta, 712 N.E.2d at 974-75. In Ashlock, the court held that the defendant's behavior did exhibit signs of intoxication when she fell down and required assistance to stand upright. 475 N.E.2d at 1168-71. Similarly, in Morrill, defendant